RECORD
AND
PAPERS

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

ERIC L. DAVIES AND MIRELLA M. DAVIES

Petitioners,

v.

Hon. PHILIP DOI;
Judge of the Hawaii District Court, First Circuit;

Judges of the Hawaii Circuit Court, First Circuit;

DAVID T. MOYSA and JANE F. MOYSA;

Respondents.

On Petition For Writ of Certiorari
To The Supreme Court of The State of Hawaii

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves a three-year injunction, as amended, which contains special conditions that make a criminal offense of harmless speech activities in a manner petitioners assert is patently unconstitutional on its face. On appeal, the Hawaii Supreme Court held it lacked jurisdiction to review a condition as plaintiff's counsel erred by appealing the filed order granting the motion to amend rather than timely appealing the amended injunction itself. The Hawaii Supreme Court then rejected a petition for a writ of mandamus, in large part on the grounds that there is no right to effective counsel in a civil appeal.

1. May First Amendment rights be substantially or permanently lost due to an inadvertent procedural error?

2. Should the 6th Amendment right to effective criminal counsel apply to:
   a. an appeal of an injunction with criminal penalties issued by a civil court?
   b. an interlocutory criminal appeal?

3. Did the Hawaii Supreme Court violate petitioners 14th Amendment due process rights:
   a. by denying all opportunity for a hearing on the merits of fundamental federal rights?
   b. by insufficient notice that petitioner's method of appeal would be deemed invalid?

4. Did the Hawaii Supreme Court wrongly deny mandamus review?

5. Is special condition 1 of the injunction, which broadly makes criminal harmless sounds, void as facially repugnant to the U.S. Constitution?

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PETITION FOR WRIT OF CERTIORARI

Eric L. Davies and Mirella M. Davies respectfully petition for a writ of certiorari to review the judgment of the Hawaii Supreme Court in two closely related matters, cases number 28753 (appeal) and number 30165 (petition for writ of mandamus).

OPINIONS BELOW

All opinions and orders in these cases are unpublished. This includes the orders of the Hawaii Supreme Court issuing summary dismissal of appeal, denying motion for reconsideration, granting of attorneys fees, and denying petition for mandamus. Also unpublished is the amended injunction of the Hawaii first district court underlying both cases.

JURISDICTION

The summary disposition order of the Hawaii Supreme Court concluding appeal #28753 was issued on October 2, 2009. A timely motion for reconsideration was denied on October 21, 2009. The order of the Hawaii Supreme Court denying petition for mandamus was entered on December 7, 2009. The jurisdiction of this court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant provisions are the First, Fifth, Sixth, Ninth, and Fourteenth Amendments to the United States Constitution; Hawaii Revised Statutes ("HRS") §604-10.5; Hawaii Rules of Appellate Procedure ("HRAP") Rule 4(a); Revised Ordinances of Honolulu ("ROH") Sections 41-34.1 & 41-34.3; and Hawaii Administrative Rules ("HAR") section 11-46-

4 & 11-46-9. All relevant portions of these provisions are set forth in appendix "M".

STATEMENT OF THE CASE

A. Background

This case is a story of the failure of every level of the Hawaii court system to even attempt to defend federal rights, as if the highest law in the land is only of secondary concern on this remote island, disconnected from the rest of the country. But first, one must set the scene:

Petitioners Eric and Mirella Davies ("Davies") live next door to respondents Terry and Jane Moysa ("Moysas") in a close-quartered development in a rural area on the north shore of the island of Oahu. The 15 small homes in the development are closely located within 30 to 50 feet of one another on a cul-de-sac. The parties' shared property line is 25 feet from the Davies' home. Because the development is within a quiet rural area far from busy streets, small sounds can carry significant distances very easily. However, there are also all the incidental noises typically found in a tightly packed residential neighborhood: children playing, dogs barking, lawn mowers, radios, televisions, etc. Thus, sounds made by one neighbor are routinely heard by surrounding neighbors.

The dispute began when Jane Moysa complained that she could hear Mirella Davies talking while on the telephone (from more than 30 feet away) even though the Davies' jalousie windows were closed. The Moysas then began complaining about the volume that the Davies listened to their recorded sermons and religious music. These complaints later

transformed into a petition for injunction against harassment filed in the Hawaii district court. The Davies have always denied, and still deny, that they ever have harassed the Moysas.

B. History of the Case

INITIAL INJUNCTION

On January 4, 2007, per-diem Hawaii district court Judge Philip Doi granted an injunction [Appendix L] with two special conditions ("Conditions") under Hawaii Revised Statues ("HRS") §604-10.5 against the Davies on behalf of the Moysas. The first condition restricted the volume of amplified sound at the Moysa property line to a decibel limit. The second was a broad, prior restraint on the content of the Davies' speech in flagrant violation of the First Amendment[1]. The injunction was set to the 3-year maximum permitted by HRS §604-10.5(f)[2].

HRS §604-10.5(h) makes a violation of the injunction a criminal misdemeanor, which carries a maximum sentence of one year in jail. Further, HRS §604-10.5(h) specifies mandatory minimum jail

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[1] The special conditions of the initial injunction:
(1) Respondents shall not play any music, sermons, or anything else on a television, stereo or other sound reproduction device such that the sound can be heard on the Petitioner's property at a level greater than 55 decibels during the hours of 7:00a.m. to 10:00p.m., or at a level greater than 45 decibels during the hours of 10:00p.m. to 7:00a.m., as provided by Hawaii Administrative Rules section 11-46-4.
(2) Respondents shall not make any statements to any third party regarding the Petitioners; provided, however, that Respondents may conduct business or file complaints with the homeowner's association.

[2] HRS §604-10.5(f) further allows the court to issue additional injunctions without any limit to the total cumulative time.

terms for subsequent convictions. Thus, the Davies were made subject to arrest, prosecution and imprisonment for up to a year for harmless speech to any person, such as saying "My neighbor's name is Jane" to family members[3,4].

AMENDED INJUNCTION

On May 22, 2007 the Moysas submitted an Order to Show Cause motion [Record on Appeal: "RA" 86-153], which (wrongly) alleged violations of both Condition 1 and Condition 2. This motion also requested Condition 1 be amended to prohibit any audible sound from a sound reproduction device at a distance of 30 feet [RA-99] The Davies, represented by counsel, challenged the alleged violations [RA 156-241] as unsupported by the facts and noted that the injunction and the proposed amendment were constitutionally attackable. [RA 159,166]

On June 12, 2007 the district court, without hearing testimony, dismissed all allegations that the Davies had violated Condition 1 due to lack of admissible evidence and then asked each party to separately submit 60(b) motions to amend the order.

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[3] This speech restriction not surprisingly caused the Davies substantial and irreparable harm from the fear that any wrong word might land them in prison. The speech restriction in practicality made it illegal to mention either restriction, or the Davies' all consuming effort to have their rights restored, or Mirella Davies' falsified arrests, or the Moysas' ongoing harassment of the Davies The Davies had no alternative but to withdraw from most every relationship rather than be forced to by the State to routinely lie about the status of their life.

[4] In fact, on August 24, 2007 Judge Doi stretched the injunction even further still and fined Eric Davies $500 for writing what he wrongly believed was an *indirect* reference regarding the Moysas, after the police declined to arrest Eric.

On July 3, 2007 the Moysas filed their 60(b) Motion to Amend [RA 288-316], which requested a sound ban at 25 feet, the distance from the Davies' home to the Moysas' property line. The Moysas further requested that the state seize the Davies' television, entertainment system and/or computer on the mere accusation of an audible sound. The same day, the Davies submitted their 60(b) Motion for Relief [RA 256-287]. The Moysas, opposing the Davies' motion [RA 317-341] again suggested a distance limitation [RA 326]. The Davies' reply [RA 354-362] argued that the proposed amendment swept unnecessarily broadly and was a violation of the constitution[5], and exceed the district court's jurisdiction [RA 357,359].

On July 31, 2007, Judge Doi held a consolidated hearing for the two 60(b) motions. During the hearing, the Davies' counsel repeatedly asserted that the proposed amendment was unconstitutional [Transcript of Hearing ("Tr") 7/31/07 pp 68,69,75-76,78]. Eric Davies personally pleaded with the court that the injunction was an effective ban on all use of sound amplification:

> "What you are asking, your honor, is that I never play any music, never watch television, never listen to my Bible teaching. There is no way I can restrict it to not being heard thirty feet away. It's just not feasible." [Tr 7/31/07 75]

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[5] The early arguments by Davies' counsel presented condition 1 as a violation of the constitutional "right to privacy" (i.e. the free exercise of activity within a private home without unreasonable government intrusion). This "right to privacy" has been indirectly inferred from several constitutional amendments, including the First Amendment

In reply, the court repeatedly stated/implied that its interest was not an order that would stand up on appeal or be constitutional, but rather the goal was practicality and making it easy on the police to know how to issue an arrest [Tr 7/31/07 43,67,81,82][6]. The court's attitude towards federal rights is best represented in its own words:

> "It's all well and good to have constitutional issues, you know, and go to the Supreme Court and whatnot... but this is District Court and this is where we come face to face with people and so I'd like to fashion something that works." [Tr 7/31/07 67]

The court capped the hearing off by calling its injunction a "live, uncontrolled experiment as to whether it works or not"[Tr 79]. The district court then amended Condition 1[7] to be severely more restrictive, making it as flagrantly in violation of the First Amendment as Condition 2, which was left

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[6] While considering the addition of the still vastly inadequate phrase "with no legitimate purpose" to the prior restraint of Condition 2, the court said "I'm not gonna alter that sentence because I want it to be enforceable I don't want the police to be scratching the police's collective head and wondering whether it has a legitimate purpose or not" [Tr 7/31/07 81]

[7] Condition 1, as amended, reads:
1) Respondents shall not play any music, sermons, or anything else on a television, stereo, or other sound reproduction device such that the sound can be heard thirty (30) feet or more away. The thirty (30) or more feet shall be measured from the point where the sound is audible (a) to the nearest part of the Davies residence, if the sound source is within the Davies residence or (b) to the sound source, if that source is not within the Davies residence. Notwithstanding anything to the contrary it shall not be a violation of this injunction with respect to sounds audible within the Davies property.

unchanged [Appendix D]. Specifically, the changes made to condition 1 were:

a) The allowable sound volume was dramatically reduced, from 55dBA/45dBA to the very threshold of audibility, even if in the presence of loud background noises. (HAR§11-46-4, in contrast, raises the level in the presence of louder ambient background noise, see HAR§11-46-9(g).)

b) The prohibited sound duration was reduced from a 2 minute total in any 20 minute period (as specified by HAR §11-46-4) to even a single momentary sound.

c) The location of measurement was changed from the Moysa property line to 30 feet fully surrounding the Davies' home on all sides or 30 feet from the sound source wherever the Davies are in the United States.

The Davies, who deeply value the rights guaranteed by our constitution, have been devastated by these deprivations of their freedoms. Desperate to have their freedoms restored, the Davies fought for their rights with the assistance of counsel until all their finances were drained, then continued forward on their own, now afraid that they will suffer repeated issuance of similar three-year injunctions as long as they live next door to the Moysas.

ARRESTS OF MIRELLA DAVIES

The first full day the "protective" injunction was in effect, August 3, 2007, the Moysas and their friends gathered in the driveway of a third party at a mark they had painted 30 feet from the Davies home. The Moysas then repeatedly called the police until they found one willing to arrest Mirella Davies for

allegedly making an audible amplified sound[8]. Mirella was arrested again the afternoon of August 15, 2007. Said arrests were based only on claims that: (a) music was heard from inside the Davies' house at an unspecified volume and duration, and (b) Mirella Davies' (unamplified) singing "sounded" as if it were recorded.

The morning of Mirella Davies' second arrest, the Jane Moysa and two of her friends inadvertently recorded a conversation in which they pre-planned to have Mirella Davies arrested. This recording was inadvertently admitted into evidence *by the Moysas* in a related case. This recording, made available to the Hawaii Supreme court in the writ of mandamus, shows a friend of Jane Moysa offering to lie to the police that she heard music from inside the Davies' home and Jane Moysa asking the friend to please wait until she returns from lunch (so the arrest would not impede her lunch plans). Ultimately, the conspirators agreed they would gather people after lunch to say Mirella's (un-amplified) singing sounded recorded[9].

NOTICE OF APPEAL

Orders granting the Moysas' 60(b) motion and denying the Davies' 60(b) motion were filed with the court clerk on August 21, 2007 [Appendices J & K]. On September 19, 2007, within the 30 days required by Hawaii Rules of Appellate Procedure ("HRAP")

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[8] The Honolulu police heard no sound, yet without a warrant forced their way into the Davies' private home to arrest and handcuff a naked Mirella Davies getting into her bath

[9] Despite this almost miraculous evidence, the Davies have been unable to convince the Honolulu Prosecuting Attorney to view the videotape and consider dropping the criminal charges.

Rule 4(a), the Davies' counsel filed a notice of appeal of these two orders. The appeal continued on its normal process for just over two years[10]. On October 2, 2009 the Hawaii Supreme court held [Appendix B] that the filed order granting the Moysas 60(b) motion to amend was "superfluous" to the injunction issued July 31, 2007. The Davies' appeal of the amendment to the injunction was therefore held untimely. In contrast, the appeal of the order denying the Davies 60(b) motion for relief was held to be timely[11]. The court thus held it had appellate jurisdiction over Condition 2 (unchanged from the initial injunction), but not over Condition 1, as amended.

MIRELLA'S ABORTED CRIMINAL APPEAL

On May 27, 2008 Mirella Davies, through counsel, submitted to the Hawaii circuit court handling the criminal case a Motion to Dismiss Complaint or in the Alternative to File an Interlocutory Appeal [Exhibit 5 of writ of mandamus, #30165]. The motion argued condition 1 was void and unenforceable as facially in violation of the First Amendment, overbroad, vague, and exceeded the issuing court's jurisdiction [Memo in Support, 3-8]. Additionally the motion asserted that the arrests were made based on false representations and that the state lacked probable cause as no one claimed

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[10] The appeal even withstood a motion to dismiss for lack of jurisdiction submitted to the Hawaii ICA by the Moysas.

[11] The logic that the order granting the Moysas 60(b) motion was "superfluous" to the amended injunction but the order denying the Davies' 60(b) motion was not "superfluous" is tenuous at best. Both orders requested the injunction be modified, and both were resolved by the amended injunction. This ruling raises possible equal protection issues

any personal knowledge that sound amplification was actually used. [8-12]

On June 26, 2008 the circuit court granted the interlocutory appeal and denied the motion to dismiss without considering the merits [Appendix I]. The order instructed Mirella Davies to wait until after process of a discovery subpoena on the Honolulu Police before filing the appeal. The order did not however *explicitly* grant an extension of time to appeal. Mirella Davies followed the court's order and submitted her notice of appeal August 6, 2008. On November 28, 2008 the Hawaii ICA dismissed Mirella Davies' interlocutory appeal for lack of jurisdiction as not timely filed because the circuit court failed to "expressly extend the time" and Hawaii case law only provides for the granting of an exception on an appeal from a criminal *conviction*. [Appendix H].

Rather than challenge the ICA's dismissal by writ, Mirella Davies followed a suggestion from the prosecutor's office and stipulated to a continuance, placing the criminal trial on hold until the civil appeal (#28753) resolved the issue of the validity of Condition 1. The trial is still on hold as of this writing.

HAWAII ICA IN APPEAL OF THE 60(b) MOTIONS

The appeal of the two 60(b) motions raised the following federal issues on condition 1: that it violated the First Amendment, violated the right to privacy, and was overbroad and/or vague. [Opening Brief, Jan 29, 2008 13-16]

On May 4, 2009 the Hawaii Intermediate Court of Appeals ("ICA") affirmed Condition 1 and

vacated Condition 2[Appendix F]. Relying on an obscure Hawaii case and ignoring clearly established federal law, the ICA concluded that Condition 1 did not violate the Davies' free speech because it "does not restrict the content of the sound, but rather its volume" The holding that all sound volume restrictions are inherently valid, no matter how severe, was logically indefensible and defied common sense.

HAWAII SUPREME COURT WRIT OF CERTIORARI

On July 9, 2009 the Davies, now acting pro-se, filed an application for a Writ of Certiorari with the Hawaii Supreme court to correct the ICA's grave errors. The petition argued that condition 1 violates the First Amendment and due process, and that the district court exceeded its statutory authority. On September 3, 2009, Eric Davies personally appeared before the court for oral argument.

On October 2, 2009 the court issued it's summary disposition order [Appendix B] holding that it lacked appellate jurisdiction as to Condition 1 and vacating the ICA's ruling as to Condition 1, leaving no ruling by any court regarding Davies' constitutionally protected federal rights. The court further held that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement that cannot be waved" [*Id*]

On October 12, 2009 the Davies submitted a motion to reconsider, which raised the following arguments 1) The court had jurisdiction over Condition 1 because the pleadings of the Davies 60(b) motion for relief, timely filed, raised the issue of Condition 1 as amended and the joint hearing effectively consolidated both 60(b) motions. 2) HRAP

4(a)(5) defines entry of an order as "in the office of the clerk of the court" and the injunction order was instead filed "in open court" 3) The Davies procedural due process rights were violated by insufficient notice that the amended injunction started the tolling of time, 4) The Davies procedural due process rights were violated by insufficient notice that the order granting the Moysas 60(b) motion to amend was "superfluous" and not appealable, and 5) the nature of the appeal was criminal as well as civil, and the court may decline to dismiss a criminal appeal if counsel fails to follow procedural rules. The court summarily denied the motion to reconsider without explanation on October 21, 2009 [Appendix E]. The court further granted the Moysas their entire $24,980 in attorney's fees and $209.23 in costs [Appendix C], despite the fact that the Davies had prevailed on Condition 2.

HAWAII SUPREME COURT PETITION FOR WRIT OF MANDAMUS

Undeterred, knowing that justice and the Constitution itself demands that no one can be permanently deprived of their First Amendment rights because of an inadvertent procedural error, the Davies returned to the Hawaii Supreme Court on November 12, 2009 with a petition for writ of mandamus asking for extraordinary relief. The petition requested orders a) to the Doi of the district court to vacate condition 1 and b) to the circuit court to dismiss criminal charges against Mirella Davies or c) any alternate and equivalent relief.

In the petition for mandamus The Davies raised the following arguments: 1) The Davies clear and indisputable right to relief derives from the fact

that Condition 1 is facially in violation of the United States Constitution [Id. pp.10-19]. 2) The Davies lack any other means to adequately address the wrong [p20] 3) Mandamus may issue on sufficient showing of excuse for the failure to timely pursue another remedy, such as the neglect of an attorney or a court [p21-22], 4) Mirella Davies, a criminal defendant, should not be deprived of a ruling due to failure to comply with procedural rules [p22] 5) Mandamus may issue even if another remedy is available if the order from which relief is sought is void, and Condition 1 is void as facially in violation of the First Amendment to the U.S. Constitution [pp23-24], or alternately 6) Mandamus may issue to confine an inferior tribunal to lawful exercise of its proper jurisdiction, and the district court exceeded its statutory power when it issued an order restraining harmless, non-harassing behavior. [p24].

The Hawaii Supreme court, avoiding a ruling on the merits, denied the Davies petition on December 7, 2009 [Appendix A]. The reasons given were: 1) There is no constitutional right to effective assistance of counsel in a civil appeal[12] 2) Mirella Davies is not entitled to relief because she chose not to apply for a writ of certiorari to review the dismissal of her criminal appeal[13] 3) The district court appears to have acted within its jurisdiction as the Davies failed

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[12] This reasoning ignores the obvious, that mandamus is not an appeal, and that there does exist a constitutional right to freedom of speech and religion, known on the mainland as the First Amendment to the United States Constitution.

[13] While she may or may not be "entitled" to relief, the court still could have easily granted mandamus in the interest of promoting justice.

to show he acted with the *purpose* of enjoining non-harassing behavior[14].

With this ruling, the Hawaii Supreme court firmly cemented its errant principle that constitutional rights may be permanently deprived by order of a civil court[15].

REASONS FOR GRANTING THE PETITION

A. This Court May take Jurisdiction.

At first glance it might seem that this court may not have jurisdiction to review the dismissal of the Davies' appeal because the appeal was procedurally barred only by a state rule. However, as a threshold matter the Hawaii Supreme court first had to implicitly decide several constitutional issues, such as a) Can a failure to follow procedural rules

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[14] The Davies are unaware of any case law that states that jurisdiction is limited by the *intent* of the judge rather than the *actions* of the judge

[15] FEDERAL DISTRICT COURT

Eric Davies has also unsuccessfully attempted to restore his rights in the federal courts through a 42 U.S.C. §1983 suit for declaratory relief filed in December of 2008 (CV 08-00548), asserting that the indefinite delays of the state appellate process constituted an inadequate remedy given the severity of First Amendment violation. As with the state courts, the federal district court of Hawaii avoided any review on the merits. The court offered various shifting reasons to avoid ruling on the merits, most recently bizarrely adopting the same position as the Hawaii Supreme court, that Davies is permanently prohibited from federal declaratory relief because Eric Davies once had, for 30 days in 2007, an opportunity for a remedy in state court. The ruling was despite the fact Davies pointed out FRCP Rule 57 which states plainly "The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate

take precedence over constitutionally guaranteed First Amendment rights?[16] b) Do the Davies have a 6th amendment right to competent counsel while challenging a criminal injunction issued by a civil court[17]? c) Do the Davies have a procedural due process right to be heard because they had inadequate notice that the method of appeal they used was invalid? Since the Hawaii Supreme court's decision to dismiss the Davies' was not based solely on state law, this court may take jurisdiction to review the appeal, to ensure important constitutional issues are addressed. "This court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law" *Ohio v. Reiner*, 532 U.S. 17,20 (2001).

The denial of the Davies petition for mandamus was not procedurally barred by state law but rather was denied at the discretion of the court after weighing federal constitutional issues. This court may take jurisdiction over the erroneous denial of petition for mandamus.

B. Hawaii Has Failed the Constitution at Every Level

In regards to federal rights, the justice system in the state of Hawaii is fundamentally broken: a) The district court issued an injunction nearly as violative of the First Amendment as imaginable, while openly admitting the Constitution was not its

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[16] Or alternately: is the state's HRAP Rule 4(a) constitutional as applied to this case?

[17] The Davies filed their notice of appeal *after* Mirella Davies criminal arrests, and used the same attorney for both her criminal defense and the "civil" appeal. Her 'civil' appeal was therefore actually a part of her criminal defense

concern. b) The police forced their way into a private home without a warrant to arrest on a misdemeanor charge c) The prosecutors won't view the videotape of witnesses to a criminal arrest plotting to lie. d) The ICA flagrantly ignored federal law (i.e. reasonable time, place, and manner) while ruling that there can be no sound volume limit that is too restrictive. e) The Hawaii Supreme Court twice ruled that a simple procedural error must override the First Amendment, even when making a discretionary ruling. Finally, f) The Federal district court believes it can do nothing but stand by and watch the Constitution be trampled.

As this court may know, there is vocal movement of people who believe that the islands should be returned to control of the Kingdom of Hawaii. We believe that this attitude, of not really belonging to the United States, has seeped into the culture and softened the passion that all citizens should have for our Constitution. Regardless of the reason, it is clear that a systemic problem exists and the state of Hawaii has lost its way, forgetting its obligation to defend federal rights. This court should review this case to reaffirm the vital importance of free speech and remind everyone that no law or rule stands above the Constitution.

C.This Case Raises Important Questions of Law

It takes no sophisticated reasoning to know that an inadvertent failure to properly follow a procedural rule cannot permanently bar review of a state court order which spits in the face of the First Amendment and directly makes a criminal offense out of obviously protected speech. After all, does not the plain language of the First Amendment say

'shall make no law .. abridging the freedom of speech", and the Fourteenth *"No State shall make or enforce any law which shall abridge the privileges... nor deprive any person of ... liberty.. without due process of law"*? Yet, this is precisely what the State of Hawaii has done. What the state has done *must* be invalid by first principles[18], *must* violate due process, and there *must* be a means to correct the wrong.

Yet, the Hawaii Supreme Court could see no reason within the legal framework of known case law to accept jurisdiction over the Davies appeal or to grant mandamus. Something, therefore, is fundamentally lacking in the case law that needs desperately to be corrected.

The core reasoning of the Hawaii Supreme Court was that there is no constitutional right to effective counsel in a civil case. As is typical, the court cited only to Hawaii law, however the principle is also established federal law: "there is no constitutional or statutory right to effective assistance of counsel on a civil case." *Mekdeci v. Merrell Laboratories* 711 F.2d 1510 (11th Cir. 1983) see also *Watson v. Moss*, 619 F.2d 775 (8th Cir 1981); *United States v. White*, 589 F.2d 1283 (5th Cir.1979), and many more The distinction however, is that these cases were demands for monetary damages, not for restoration of protected federal rights. Nor did these cases challenge a civil injunction with criminal penalties.

The fundamental flaw made by the Hawaii Supreme court in denying appellate jurisdiction while asserting that the Davies have no constitu-

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[18] "a law repugnant to the constitution is void" *Marbury v. Madison*, 5 U.S. 137 (1803)

tional right to effective counsel is the court failed to recognize that a) *there is a constitutional right to free speech* and b) *there is a constitutional right to due process treatment of constitutional rights*. Thus, analogous to how the 6th Amendment right to criminal counsel inherently provides a court authority to overlook procedural flaws of a criminal appeal, the First Amendment also inherently provides a court authority to overlook procedural flaws of a First Amendment appeal, because to do otherwise would be a violation of due process[19]. An alternate perspective is that because the state used HRAP Rule 4 to deny the Davies their First Amendment rights, HRAP Rule 4 could be viewed as unconstitutional as applied to this case[20]

A second important question of law raised is whether the constitutionally guaranteed right to effective criminal counsel applies to a civil appeal of a criminal injunction HRS §604-10.5, passed in 1986, is relatively untested law. It appears that nationwide the practice of issuing injunctions with criminal penalties from lower state civil courts is also relatively new, but a growing trend. Since the boundaries between "civil" and "criminal" are blurring, it serves justice to clarify how a mixed civil/criminal case should be treated in the context of the 6th amendment.

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[19] In other words, First Amendment rights inherently embody a 14th amendment due process right to a hearing on the merits, regardless of any procedural issues

[20] In contrast, the denial of mandamus based only on failure to comply with HRAP Rule 4, which regulates appeals, was a plain error of law and an abuse of discretion

A third area of law raised by this case involves rights to due process and effective counsel in an interlocutory criminal context. The state itself ultimately bears the responsibility of the procedural error dismissing Mirella Davies interlocutory appeal. however Mirella Davies' counsel drafted the order that the court signed, which failed to "expressly" grant an extension of time to file. Both the ICA and the State Supreme Court held that to regain judicial review Mirella Davies must now must be tried and convicted (of a crime she did not commit). In doing so, the state disregarded the 14th amendment's prohibition on enforcement of laws which abridge the privileges or immunities of citizens of the United States. Neither procedural errors by the state nor by her attorney should deprive her of her due process right to a ruling on the merits[21] *before* being criminally tried, when she is asserting that the order is void as facially illegal. Hawaii rules have yet again wrongly trumped the Constitution.

D. The Hawaii Supreme Court has Decided an Important Federal Question in Conflict with other State Courts

Other states have addressed the question of the right to effective counsel in non-monetary civil cases and have come to more carefully reasoned conclusions than Hawaii. specifically in cases which involve the termination of parental rights[22].

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[21] Note that the criminal trial judge denied Mirella Davies motion to dismiss without making any ruling on the merits

[22] "The statutory right to counsel in parental-rights termination cases embodies the right to effective counsel." *In re M.S.*, 115 S.W.3d 534, 544 (Tex.2003). see also *In re K.L.*, 751 N.W.2d 677

In re Ak V., 747 A.2d 570 (D.C.2000) reviewed the denial of appellant's motion to file a late appeal of a disposition order removing appellant's children from her custody. The court recognized that "in a civil case the usual remedy for misfeasance or nonfeasance on the part of counsel is for the aggrieved party to bring a malpractice suit against the attorney seeking monetary damages." [23] *Id.* at 576. But "[t]hat course does not provide an apt remedy here, where the effect of a failure by counsel to protect the client's rights may be loss of the ability to contest a court-ordered separation of child from parent." *Id.* at 576-77 In contrast to Hawaii's handing of the Davies' case, the D.C. court was unwilling to impute an error of counsel to appellant with the result that appellant's right to judicial review would be lost and remanded for the trial court to "determine whether there is excusable neglect" justifying extension of the time for appeal.

While there is a difference in the legal foundation underlying these cases (a statutory right to appointed counsel) and the Davies case in Hawaii (First Amendment rights), the fact still remains that state after state has recognized that blind adherence to the "no right to effective counsel" rule is inappropriate for a non-monetary civil case involving fundamental rights. The disconnect between state

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(N.D. 2008) *In re E.H.*, 880 P.2d 11 (Utah Ct.App. 1994). *In re M.D.(S.)*, 168 Wis.2d 995, 485 N.W.2d 52 (1992).

[23] *See also In re K.L.*, 91 S.W.3d 1 (Tex.App.-Fort Worth 2002) (a malpractice suit does not provide an apt remedy in the context of a termination of parental rights case. Monetary damages are wholly inadequate given the nature and severity of the interests involved)

courts on a fundamental federal issue is a worthy reason for this court to accept the Davies' petition.

E. Condition 1 is an Ongoing Violation of the Davies' Constitutional Rights

Following is a condensed version of the argument presented in the petitions for certiorari and mandamus, demonstrating the invalidity of condition 1.

1. The First Amendment Protects the Davies' Right to Play Music and Use Sound Amplification Equipment

It has been repeatedly and definitively stated that music and the use of sound amplification are forms of protected speech under the First Amendment. *Ward v. Rock Against Racism* 491 U.S. 781 (1989); *Saia v. New York*, 334 U.S. 558 (1948); *Reeves v. McConn*, 631 F. 2d 377 (1980); *Lilly v. City of Salida* 192 F Supp 2d 1191 (D. Col 2002)[24]. Condition 1 must either meet the constitutional tests for protected speech or be declared invalid.

2. Condition 1 Must use the Narrowest Terms to Pin-Point Target only Harassing Behavior

For *statutes* restricting protected speech, this court has repeatedly held that the government may impose reasonable restrictions on the time, place, and manner of protected speech, provided such restrictions are: (1) content neutral, (2) narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative avenues of

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[24] In *Stanley v. Georgia* 394 U.S. 557 (1969) this court held that a man watching a (pornographic) film alone in the privacy of his own home is still an exercise of free speech

expression. *Ward* at 789 This three-part test has been labeled "intermediate" scrutiny, in contrast to "strict" scrutiny applied to content restrictions (see Justice Scalia's dissent in *Madsen v. Women's Health Ctr.*, 512 U.S. 753,754 (1994)). Further, the burden of proof is on the government to demonstrate its restrictions are narrowly tailored. *U.S. v. Jane DOE aka Diane Nomad*. 968 F.2d 86 (D.C. Cir 1992)[25]

Injunctions are held to an higher standard than statutes. *Madsen* states a "heightened scrutiny" applies, in part, because "[i]njunctions carry greater risks of censorship and discriminatory application". *Madsen* clearly sets the test for condition 1:

> "In evaluating a content neutral injunction, the governing standard is whether the injunction's challenged provisions burden no more speech than necessary to serve a significant government interest ... the injunction must be couched in the narrowest terms that will accomplish its pin pointed objective." *Id* at 754

Thus. condition 1 must use the narrowest terms to accomplish the pin pointed objective of preventing harassment, or be declared invalid[26].

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[25] In *U.S. v Nomad* a conviction was reversed because the government failed to carry its burden of showing that a federal regulation prohibiting playing an audio device at a volume level exceeding 60dBA at a distance of 50 feet was narrowly tailored

[26] *Madsen* also holds that the failure of a first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of a second broader order However, the record in this case does not provide any proof that the first injunction failed No testimony was taken no evidence was admitted, and no findings of fact were made Further the Davies were never permitted to produce testimony or evidence rebutting the claims they had violated the initial injunction

3.Condition 1 Fails Even Intermediate Scrutiny

While Condition 1 must meet the heightened "narrowest terms" standard, it completely fails even the less demanding "narrowly tailored" standard of scrutiny meant for statues.

a. Subtest #1: Condition 1 is Only Nominally Content Neutral

While the phrase "or anything else" may nominally make Condition 1 content neutral, the specific restricting of "sermons" clearly suggests that the underlying intent was in fact content regulation.

b. Subtest #2: Condition 1 is Not Narrowly Tailored to serve a Significant State Interest

(1) **Condition 1 Prohibits Amplified Public Speaking.** Condition 1 prohibits the Davies from using sound amplification that can be heard 30 feet from the source if the source is not in the Davies residence. Thus, for example, should the Davies use amplification to express their political views at a city counsel meeting or give personal testimony in church, the Davies would be subject to arrest and imprisonment for harassment of the Moysas, regardless of where the Moysas are. For this reason alone, Condition 1 is inescapably invalid.

(2) **Condition 1 broadly prohibits non-harassing conduct.** Harassment as defined by HRS §604-10.5(a) must be conduct:

> "directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such course of conduct

would cause a reasonable person to suffer emotional distress."

To comply with intermediate scrutiny, condition 1 should have been narrowly tailored to prevent disturbing amplified sounds directed at the Moysas which serve no legitimate purpose. As written, however, any *brief* sound of a *routine* (legitimate) nature, *mildly audible* to *anyone* standing at the Davies' property line is a criminal violation of the injunction. However, such a harmless sound would not: (1) "cause a reasonable person to suffer emotional distress": (2) necessarily be "directed at" the Moysas: and/or (3) necessarily serve "no legitimate purpose". Clearly, fleeting, barely audible sounds or routine sounds with legitimate purpose are not harassment, and would not cause a reasonable person emotional distress. A sound heard only on the property of an unrelated third party is unlikely to be directed at the Moysas[27]. However, all such harmless sounds would still violate condition 1 and could result in the arrest of the Davies.

(3) **The prohibition of non-disturbing sounds is not a significant state interest.** *Reeves* states "there is no valid state interest in prohibiting amplified sound that does not actually cause, or imminently threaten to cause, material disruption ... undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression". *Id.* at 385 Because condition 1

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[27] A similar clause of the *Madsen* injunction that regulated activity around the property of an unrelated third party was vacated "We hold that on the record before us the 36 foot buffer zone as applied to the private property to the north and west of the clinic burdens more speech than necessary to protect access to the clinic" *Id.*

prohibits brief, barely audible sounds that do not actually cause disruption, and the government has no valid interest in prohibiting such sounds, Condition 1 is invalid.

(4) **"Always, anywhere" is by definition not a narrowly tailored time and place restriction.** Condition 1(a) prohibits sound from inside the Davies' home at all times, on all sides of the house Condition 1(b), read literally, applies at all times and in all places, fully surrounding the Davies wherever they are in the country, even if the Moysas are 3000 miles away. It applies not only to the Davies private property, but also all other public and private property. Neither of these clauses even make a token attempt to be narrowly tailored as to time and place[28]. Because "always, anywhere" is by definition the broadest possible time and place restriction, Condition 1 is invalid.

(5) **Audible at 30 feet is not a narrowly tailored manner restriction.** Condition 1 prohibits amplified sounds audible at 30 feet from the Davies' home (i.e., 5 feet from their property line), and is much more restrictive than the ordinance found to be not narrowly tailored in *Lilly v. City of Salida* (audible 25 feet from a private property line). Thus, condition 1 is also invalid.

Condition 1 additionally prohibits amplified sounds audible at 30 feet from the source when outside the Davies' home, presumably under the

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[28] Condition 1 stands in stark contrast to the prohibition found appropriately tailored in *Madsen* which restricted certain forms of sound "During the hours of 7 30 a m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods"

premise that a sound audible at 30 feet would be unreasonably loud near the source. However, this premise is wrong, as routine sounds in a quiet environment are easily heard at 30 feet. A similar restriction was found invalid in *Deegan v. City of Ithaca*, 444 F.3d 135 (2d Cir. 2005) (policy standard which prohibited sound audible at 25 feet within a public space found unconstitutional). A certified noise expert testified that a sound generated at a mere 56 decibels could be heard in the Ithaca Commons at a distance of 25 feet for 50 percent of the time. The expert testified that 56 decibels was quieter than the clicking of high heeled boots, a conversation between two people, the ringing of a cellular telephone, and many other routine sounds. The *Deegan* court concluded: "a noise regulation that prohibits most normal human activity, including a spirited conversation by only two people is not narrowly tailored". Condition 1's 30 foot limit prohibits amplified sounds generated at volumes much quieter than most normal human activity, and is not narrowly tailored.

The volume of a sound that would sufficiently guarantee it could never be heard at 30 feet, even for an instant, as condition 1 requires, is of course far lower than 56 decibels. Adding in that the Davies live in a rural neighborhood where sound carries very easily and that HRS §604-10.5 requires mandatory jail sentences after the first conviction, and condition 1 is (as in *Lilly*) in practical effect a complete ban on all use of sound reproduction equipment, including televisions, radios, computers, speaker phones, etc. "A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil"

Ward at 799. Listening to Bible teaching, watching a home movie, children playing Guitar Hero (a musical video game), family singing Christmas hymns to recorded music, or watching a ballgame with friends, *in a private home*, are not "evils" worthy of being made criminal offenses, especially given the completely unrelated goal of preventing harassment.

c. Subtest #3: Condition 1 Lacks Alternative Channels for Communication

Since Condition 1 effectively constitutes a complete ban on all use of amplified sound in the Davies' home that always applies, wherever they are, the Davies have virtually no alternative channels, let alone ample ones, which permit them any expression requiring the use of amplified/recorded sound. Condition 1 is invalid

4. Condition 1 Fails Heightened Scrutiny

As previously noted, *Madsen* requires Condition 1 "burden no more speech than necessary to serve a significant government interest" *Id* at 754 .

Assume, for argument, that all unreasonable noise constitutes "harassment". Condition 1 then, burdens more than necessary because it burdens dramatically more than Hawaii sound regulations HAR §11-46-4 (55 decibels) and ROH §41-34.3 (65 decibels) [29], burdens more than virtually every sound regulation throughout the country, and burdens more than the regulations found too severe in *Lilly*, *Reeves*, and *Nomad*, all designed to be sufficient to

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[29] Revised Ordinances of Honolulu ("ROH"), Sections 41-34 1 & 41-34 3 provide a limit of *68 decibels* for no more than 10 percent of any 20-minute period at Kalakakua Avenue from sounds at the Waikiki Shell, so that "the peace and quiet enjoyed by nearby residents is not unduly disturbed"

prevent unreasonable noise. Clearly, less restrictive measures exist to prevent harassment than an injunction that round the clock bans sound 5 feet from the Davies' property line, bans sounds on all four sides of the Davies' property, and follows the Davies everywhere. Thus, Condition 1 utterly fails the required test of "no more than necessary" with "narrowest terms" and is invalid.

5. Condition 1 Violates Due Process

Assuming for argument that the phrase "such that the sound can be heard thirty feet away" is not an effective ban, it still violates the due process clause of the 14th amendment, not because the meaning of the words are unclear, but rather because the conduct required to choose between lawful and unlawful is uncertain, and men of common intelligence would differ as to its application[30].

Every time the Davies turn on a sound amplification device, they must guess at what volume of sound to use and are subject to immediate arrest and imprisonment if they guess wrong[31]. The sound expert in *Deegan* represented the audibility of sound at a given distance as a matter of statistical probability. Since the audibility of sound at a given distance is highly variable from moment to moment based on capricious factors such as ambient background noise and wind speed and direction, no man of ordinary

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[30] It is well-settled that due process forbids "terms so vague that men of common intelligence must necessarily guess as its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S 385, (1926).

[31] The Davies cannot rely on the police to distinguish whether the violation was "knowing or intentional". The police have already arrested twice without any thought to that issue.

intelligence could know what volume they must use to sufficiently lower the statistical probability that it would not be heard a mere 30 feet away. In *Deegan*, *Lilly* and *Easy Way of Lee County, Inc. v. Lee County*, 674 So. 2d 863 (Fla. App. 2 Dist. 1996). (each held audible-at-a-distance restrictions unconstitutional), each respective plaintiff attempted to reduce his volume so that it could not be heard at the given distance, and guessed wrong. In each case, this occurred only after being given fair warning by the police. In contrast, the Davies are not allowed any warning. Rather, they can be, *and have been*, arrested on a bald claim of a single audible sound. Lacking fair warning as to what conduct is permissible, Condition 1 is invalid.

F. The Davies' Procedural Due Process Rights were violated by Inadequate Notice their Method of Appeal was Invalid

The core principles of due process are adequate notice and an opportunity to be heard. The Davies have been denied both. The ruling of the Hawaii Supreme court that the Davies should have timely appealed the amended injunction rather than the order granting the motion to amend (deemed "superfluous") was such an obscure interpretation of law that it was missed by the Moysas two attorneys, the Davies three attorneys, the three judge panel of the ICA deciding on a motion to dismiss for lack of timeliness, and initially even the Hawaii Supreme court itself, for it would not have scheduled oral argument if it saw a reason for summary disposition.

In its order, the court cited to no case law that held that HRAP 4(a)(5)'s definition of entry of an order as "in the office of the clerk" included an order

filed in open court, nor did it cite to any case law that holds that an order granting a motion to amend an injunction is "superfluous" and not appealable Dilligent effort by the Davies has also uncovered no such case law. Thus without adequate notice the Davies, deprived of both their liberty and their property (attorneys fees), were denied their procedural due process rights.

G. Summary Reversal is Appropriate for the Petition for Mandamus

The decision of the Hawaii Supreme court to deny mandamus relief departs so far from settled jurisprudence that this court could grant the petition for certiorari and summarily reverse. A ruling by this court holding a) condition 1 is facially unconstitutional and void, and b) the denial of the Davies' petition for mandamus was an abuse of discretion, then remanding the case to the Hawaii Supreme court to take appropriate action is simple, straightforward, and wholly proper.

The purpose of mandamus is to provide a discretionary means to justice when no other means are available. This is why the legal standard is that there must be (1) a clear and indisputable right to relief and (2) a lack of other means to adequately redress the wrong. *State v. Oshiro*, 69 Haw. 438, 441, 746 P.2d 568, 570 (1987).

The Hawaii court used only the first test, and held that the Davies were not "entitled" to mandamus relief on the grounds that they had no "constitutional right to the effective assistance of counsel". What the Hawaii court failed to grasp is that the Davies' claim to clear and indisputable right to relief

derives not from a 6th amendment right to counsel, but rather directly from their First Amendment rights, which continue to be violated to this very day. The reasoning of the court was a grave error of law, and reversible on its face.

The Hawaii court also held that Mirella Davies was not "entitled" to relief from the procedural dismissal of her interlocutory appeal on the grounds that she did not timely contest the dismissal. What the Hawaii court failed to consider is that Mirella Davies *does* have a 6th amendment right to effective criminal counsel, *does* have a 14th amendment right to not be procedurally barred *by an error of the state* and that the state may not, by the 14th amendment, enforce an order which abridges her rights. Denial of mandamus on these grounds was at best an abuse of discretion, possibly a grave error of law, and reversible on its face.

Finally, the Hawaii court held, without citing to any case law, that "it appears" that the district court acted within its jurisdiction as the Davies "fail[ed] to demonstrate" that the court acted with "the *purpose* of enjoining" non-harassing behavior. The court effectively affirmed the attitude of the district court in its initial hearing to amend: that the ends justify the means, and that a district court judge can do whatever he likes as long as his intent is to prevent harassment. This flawed reasoning also is a grave error of law[32], and reversible on its face

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[32] Imagine as an extreme example that the judge banned the Davies from living in the United States. There is no doubt this action would exceed his jurisdiction despite the fact that his "purpose" was the prevention of harassing behavior

That the Davies have no other means to adequately redress the wrong is clearly demonstrated by the fact that despite two and a half years of relentless effort generating thousands of pages of legal paperwork the Davies have come to this court without any valid ruling by any court regarding their First Amendment claims as to condition 1. No one has yet asked the simple question: "*Does condition 1 restrict too much?*"

H. This Case will not Become Moot

Due to the extensive delays of the appellate process, the Davies come to this court knowing the three-year injunction is soon to expire. However, the repercussions of the injunction remain and still need to be resolved, and the Davies live under threat that another "temporary" injunction may issue again, and need a ruling on the merits as a form of prospective relief.

Mirella Davies still faces criminal prosecution for (untrue) allegations of violating a facially illegal order, and the criminal court still awaits final resolution of the appellate process before proceeding. Further, there is the matter of over $25,000 in attorneys fees and costs granted to the Moysas as the "prevailing party" (despite the fact that condition 2 was vacated). The granting of these fees clearly hinge on the federal questions implicitly held by the Hawaii court: that the Davies' procedural due process rights were not violated by inadequate notice and that the Davies have no right to a review on the merits

Finally, the federal rights violations raised by this injunction are capable of repetition but evading

review[13]. The Davies and the Moysas are still next-door neighbors, and there is no limit to how many times that the Moysas can request additional three-year injunctions. If the district court were to issue another injunction of the same character, the process would repeat again, the Davies deprived of their rights for most or all of the next three-year period.

CONCLUSION

The Davies have consumed vast hours researching the law in a failed defense of their rights to free speech and free exercise of their faith, trying to find a path to sanity in an undeniably absurd situation. Throughout, they have been both inspired and awed by the words of the Constitution, the efforts of this court to defend the freedoms of all citizens of the United States, and the profound wisdom it has repeatedly shown, especially towards protecting the sanctity of a private home.

Again and again, at every level of the court system the Davies have been denied an opportunity to be heard through no fault of their own, while simultaneously for three years they have been deprived of their most basic and fundamental freedoms by the state of Hawaii in a shocking manner, unlike even the most repressive regimes in world history. The First Amendment grieves with the harm done to it, and all who love justice should grieve with it.

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[13] The classic example of "capable of repetition but avoiding review" is of course *Roe v. Wade*, 410 U.S. 113 (1973) However the exception has also been applied to temporary orders restraining free speech *Iranian Muslim Org. v. City of San Antonio*, 615 S.W. 2d 202 (Tex. 1981).

We are humbled to have an opportunity to put our story before this court. We know this court sees a great many petitions, but we pray this court can see a hearing on the merits is long overdue here. Lacking any funds to hire a competent constitutional attorney, we have done our best to present a professional argument in a manner hopefully not too far from what this court is accustomed, in the hopes that this court will show grace by overlooking any failings, accept this petition, and dispense justice by whatever means is appropriate.

DATED: Honolulu, Hawaii, December 24, 2009.

Respectfully Submitted,

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APPENDIX A

No. 30165

IN THE SUPREME COURT
OF THE STATE OF HAWAI'I

ERIC L. DAVIES and MIRELLA M. DAVIES,
Petitioners,

vs.

THE HONORABLE PHILIP DOI, JUDGE OF THE DISTRICT COURT OF THE FIRST CIRCUIT, STATE OF HAWAI'I; THE HONORABLE DERRICK H.M. CHAN, JUDGE OF THE CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAI'I; DAVID T. MOYSA; and JANE F. MOYSA,
Respondents

ORIGINAL PROCEEDING
(CIV. NO. 1SS06-1-01393)
(CR NOS. 07-1-1665 and 07-1-1762)

ORDER

(By: Moon, C.J., Nakayama, Acoba, and Duffy, JJ. and Circuit Judge Trader, in place of Recktenwald, J., recused)

Upon consideration of the petition for a writ of mandamus filed by petitioners Eric Davies and Mirella Davies and the papers in support, it appears that petitioners' failure to secure appellate review of the July 31, 2007 amended injunction due to counsel's failure to file a timely appeal does not entitle petitioners to mandamus relief inasmuch as petition-

ers' district court proceeding was a civil proceeding for which the constitutional right to the effective assistance of counsel does not apply.

It further appears that petitioners are not entitled to mandamus relief from the June 20, 2008 order denying the motions to dismiss Cr. No. 07-1-1665 and Cr. No. 07-1-1762 inasmuch as petitioner Mirella Davies chose not to apply for a writ of certiorari to review the dismissal of her interlocutory appeal and the June 20, 2008 order is reviewable on appeal from a judgment of conviction, should such a judgment be entered in Cr. No. 07-1-1665 or Cr. No. 07-1-1762.

It further appears that the respondent district judge acted within his lawful exercise of jurisdiction pursuant to HRS § 604-10.5(b) inasmuch as the July 31, 2007 amended injunction enjoined harassment within the meaning of HRS § 604-10.5(a)(2) and petitioners fail to demonstrate that the respondent district judge issued the July 31, 2007 amended injunction with the purpose of enjoining petitioners from conduct that does not constitute harassment within the meaning of HRS § 604-10.5(a)(2).

It finally appears that our mandamus jurisdiction is not exercised for the policy reasons advanced by petitioners. Therefore, petitioners are not entitled to mandamus relief. See Kema v. Gaddis, 91 Hawai'i 200, 204, 982 P.2d 334, 338 (1999) (A writ of mandamus is an extraordinary remedy that will not issue unless the petitioner demonstrates a clear and indisputable right to relief and a lack of alternative means to redress adequately the alleged wrong or obtain the requested action.). Accordingly,

IT IS HEREBY ORDERED that the petition for a writ of mandamus is denied.

DATED: Honolulu, Hawai'i, December 7, 2009.

/s C.J. Moon

/s Paula A. Nakayama

/s Simeon Acoba

/s James E. Duffy Jr

/s Rom Trader

APPENDIX B

*** NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER ***

No. 28753

IN THE SUPREME COURT
OF THE STATE OF HAWAI'I

DAVID T. MOYSA and JANE F. MOYSA,
Respondents/Petitioners-Appellees,

vs.

ERIC L. DAVIES and MIRELLA M. DAVIES,
Petitioners/Respondents-Appellants

CERTIORARI TO THE INTERMEDIATE COURT
OF APPEALS
(CIV. NO. 1SS06-1-01393)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Nakayama, Acoba, and Duffy, JJ. and
Circuit Judge Pollack, in place of Recktenwald, J. recused)

We accepted petitioners/respondents-appellants Eric Davies' and Mirella Davies' (the Davies) application for a writ of certiorari to review that part of the May 4, 2009 Summary Disposition Order of the Intermediate Court of Appeals (ICA) that concluded that the Davies' right of free speech was not violated by special condition 1 of the district court's July 31, 2007 amended injunction order, which was entered pursuant to a motion to amend

the original injunction order (motion to amend). The summary disposition order also disposed of issues raised by the district court's August 21, 2007 order denying a motion for relief from the original injunction order (motion for relief).

The motion to amend and the motion for relief were filed pursuant to DCRCP Rule 60(b) and were post-judgment motions in Civil No. 1SS06-1-01393. The July 31, 2007 amended injunction order amended special condition 1 -- pursuant to the motion to amend -- by changing the measurement of sound from decibels to distance. The July 31, 2007 amended injunction order disposed of all issues raised in the motion to amend and thereby ended the post-judgment proceeding on the motion to amend. The July 31, 2007 amended injunction order effectively granted the motion to amend and left nothing further to be accomplished on the amendment of special condition 1. Therefore, the July 31, 2007 amended injunction order was final and appealable under HRS § 641-1(a) (Supp. 2007). See Ditto v. McCurdy, 103 Hawai'i 153, 157-58, 80 P.3d 974, 978-79 (2003); Chun v. Bd. of Trustees of E.R.S., 92 Hawai'i 432, 447-48, 992 P.2d 127, 142-43 (2000). The August 21, 2007 order denying the motion for relief was also final and appealable under HRS § 641-1(a).

The time for appealing the July 31, 2007 amended injunction order commenced upon entry of the order, not upon entry of the August 21, 2007 order granting the motion to amend, which was superfluous. The September 19, 2007 notice of appeal was filed within thirty days after entry of the August 21, 2007 order denying the motion for relief, but more than thirty days after entry of the July 31, 2007

amended injunction order. The September 19, 2007 notice of appeal timely appealed the August 21, 2007 order denying the motion for relief, but did not timely appeal the July 31, 2007 amended injunction order. See HRAP 4(a)(1). The timely filing of a notice of appeal in a civil case is a jurisdictional requirement that cannot be waived by the parties or disregarded by the appellate court in the exercise of judicial discretion. See Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1128 (1986); HRAP 26(b) ("[N]o court or judge or justice is authorized to change the jurisdictional requirements contained in [HRAP] Rule 4 ").

Because the Davies' timely appealed the August 21, 2007 order denying the motion for relief, but did not timely appeal the July 31, 2007 amended injunction order, the ICA had jurisdiction to decide the issues raised by the August 21, 2007 order denying the motion for relief, but lacked jurisdiction to decide the issues raised by July 31, 2007 amended injunction order. The issue of whether special condition 1, as amended, violated the Davies' right of free speech was an issue raised by the July 31, 2007 amended injunction order. The ICA lacked jurisdiction to decide that issue. Special condition 1, as amended, stands.

Therefore,

IT IS HEREBY ORDERED THAT the ICA's May 4, 2009 Summary Disposition Order is vacated as to those parts of the order that concluded that: (1) special condition 1 is not overly broad or vague and does not violate the Davies' right of free speech and (2) the imposition of special condition 1 was not an abuse of discretion because special condition 1 did not violate the Davies' right of free speech.

DATED: Honolulu, Hawai'i, October 2, 2009.

Eric L. Davies and
Mirella M. Davies, pro se,
petitioners/respondents-
appellants

Adrian W. Rosehill,
for respondents/
petitioners-appellees

/s C.J. Moon
/s Paula A. Nakayama
/s Simeon Acoba
/s James E. Duffy, Jr.
/s Richard W. Pollack

APPENDIX C

No. 28753

IN THE SUPREME COURT
OF THE STATE OF HAWAI'I

DAVID T. MOYSA and JANE F. MOYSA,
Respondents/Petitioners-Appellees,

vs.

ERIC L. DAVIES and MIRELLA M. DAVIES,
Petitioners/Respondents-Appellants

CERTIORARI TO THE INTERMEDIATE COURT
OF APPEALS
(CIV. NO. 1SS06-1-01393)

ORDER
(By Duffy, J. for the court[1])

Upon consideration of Respondents/ Petitioners-Appellees David T. Moysa and Jane F. Moysa's (Moysas) request for attorney's fees and costs on appeal, the objections filed by Petitioners/Respondents-Appellants Eric L. Davies and Mirella M. Davies (Davies) and the record herein,

IT IS HEREBY ORDERED that attorney's fees in the amount of $24,980.00 and costs in the amount of $209.23 are awarded in favor of the Moysas and against the Davies, pursuant to section

---

[1] Considered by: Moon, C.J. Nakayama, Acoba, and Duffy, JJ., and Circuit Judge Pollack in place of Recktenwald, J., recused.

604-10.5(g) of the Hawai'i Revised Statues and Rule 39 of the Hawai'i Rules of Appellate Procedure.

DATED: Honolulu, Hawai'i, November 25, 2009.

Adrian W. Rosehill
and Alan J. Ma
for respondents/
petitioners-appellees
on the request

For the Court:
/s James E Duffy, Jr.
Associate Justice

Eric L. Davies and
Mirella M. Davies, pro se,
Petitioners/respondents-
appellants in opposition

APPENDIX D

Filed in Open Court
Date and Time: July 31,2007 (4:11pm)
Clerk: Z. POPACA

IN THE DISTRICT COURT OF THE FIRST CIRCUIT STATE OF HAWAI'I

David T. Moysa	)
Jane F. Moysa,	) **Civil No. 1SS06-1-01393**
PETITIONER(S).	) **FIRST AMENDED**
	) **ORDER GRANTING**
vs.	) **PETITION FOR**
	) **INJUNCTION AGAINST**
Eric L. Davies	) **HARASSMENT**
Mirella M. Davies	)
RESPONDENT(S).)	

FIRST AMENDED ORDER GRANTING PETITION FOR INJUNCTION AGAINST HARASSMENT

The Petition for Injunction Against Harassment came on for hearing at 8:30 a.m.on January 4, 2007 at 8:30 came on for hearing **before the Honorable Philip Doi,** District Judge of the First Circuit at the Honolulu Division of the District Court of the First Circuit.

with Petitioner(s) appearing:

__ pro se

X with Counsel, Adrian RosehilL Esq.

and Respondent: Eric L. Davies:

X appearing pro se at all court proceedings through and including January 4,2007. At all subsequent hearings Eric L. Davies and Mirella M. Davies have been represented by Brian B. Custer and Gary L. Hartman.

and Respondent: Mirella M. Davies

___ appearing pro se

___ with Counsel,

X having been duly served, but failing to appear for hearing on the Petition,

The Court having reviewed the Petition and:

___ upon failure of Respondent(s) to appear.

___ Respondent(s) having stipulated to the granting of the First Amended Order Granting Petition for Injunction Against Harassment, and no findings of fact having been made.

X Evidence having been adduced thereon and the Court having found the allegations of the Petition proven by clear and convincing evidence.

X Petitioner(s) and Respondent Eric L. Davies having been served with a copy of this Amended Order in open court.

The Court has jurisdiction over the parties and this matter and Respondent(s) was/were provided notice and given a full and fair opportunity to be heard.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1 The First Amended Order Granting Petition Against Harassment is granted in this matter.

2. Respondent(s) and any other person acting on behalf of Respondent(s) are hereby restrained and enjoined from:

A. Contacting, threatening or harassing Petitioner(s). "Contacting" is defined to include but is not limited to the telephone, mail, facsimile, pager, electronic mail, internet, etc.

B Contacting, threatening or harassing any person(s) residing at Petitioner(s)' residence.

C. Entering and/or visiting Petitioner(s)' residence, including yard and garage, and/or place of Petitioner(s)' employment.

3. The parties or their attorneys shall not be precluded from serving court documents upon each other through certified mail, registered mail, the Honolulu Police Department, or an authorized process server.

4 This injunction shall be effective as of **January 4, 2007** and shall remain in full force and effect for a period of **3 years** from said date unless terminated or modified by appropriate order of this Court.

5. Special conditions or modifications: (1) Respondents shall not play any music, sermons, or anything else on a television, stereo, other sound reproduction device such that the sound can be heard thirty (30) feet or more away. The thirty (30) or more feet shall be measured from the point where the sound is audible (a) to the nearest part of the Davies residence, if the sound source is within the Davies residence, or (b) to the sound source, if that source is not within the Davies residence. Notwithstanding anything to the contrary, it shall not be a violation of this injunction with respect to sounds audible within the Davies property. (2) Respondents shall not make any statements to any third party regarding the Petitioners; provided, however, that Respondents may conduct business or file complaints with the homeowner's association..

X Court costs are awarded to Petitioner(s).

X Reasonable attorney's fees are awarded to Petitioner(s)

6. This First Amended Order shall take effect on August 2, 2007, at 5:00 p.m.

7. **WHILE THIS INJUNCTION ORDER IS IN EFFECT, RESPONDENT(S) IS/ARE PROHIBITED FROM POSSESSING, CONTROLLING, OR TRANSFERRING ANY FIREARM OR AMMUNITION. ANY FIREARM OR AMMUNITION IN THE POSSESSION OR CONTROL OF RESPONDENT(S) MUST BE IMMEDIATELY TURNED OVER TO THE HONOLULU POLICE DEPARTMENT FOR SAFEKEEPING UNTIL THIS INJUNCTION ORDER IS NO LONGER IN EFFECT.**

8. **ANY KNOWING OR INTENTIONAL VIOLATION OF THIS ORDER AGAINST HARASSMENT IS A MISDEMEANOR PURSUANT TO HRS SECTION 604-10.5, WHICH MAY BE PUNISHABLE BY IMPRISONMENT OF UP TO ONE (1) YEAR AND/OR A FINE OF UP TO $2,000, AND ALLOWS THE OFFICE OF THE PROSECUTING ATTORNEY TO PROSECUTE SUCH VIOLATIONS. IN ADDITION, ANY VIOLATION OF THE FIREARM AND AMMUNITION ORDER SHALL BE PUNISHABLE AS A MISDEMEANOR OFFENSE UNDER SECTION 134-7 OF THE HAW AIT REVISED STATUTES.**

9. **THIS INJUNCTION ORDER IS ENFORCEABLE IN ALL 50 STATES, DISTRICT OF COLUMBIA, U.S. TERRITORIES, AND TRIBAL LANDS. [18 USC SECTION 2265]. INTERSTATE VIOLATION OF THIS ORDER IS SUBJECT TO**

FEDERAL CRIMINAL PROSECUTION. [18 USC SECTIONS 2261(g), 2261A AND 2262].

TO ANY POLICE OFFICER OR OTHER OFFICER OF JUSTICE:

YOU ARE HEREBY ORDERED TO ARREST RESPONDENT(S) IF YOU OBSERVE AND/OR HAVE PROBABLE CAUSE TO BELIEVE THAT, DURING THE PERIOD STATED IN PARAGRAPH 4 HEREIN, RESPONDENT(S) HAS/HAVE VIOLATED ANY PROVISION OR CONDITION OF THIS ORDER.

Dated: HONOLULU, Hawai'i, July 31, 2007.

/s Philip Doi

Judge of the above entitled Court

APPENDIX E

No. 28753

IN THE SUPREME COURT
OF THE STATE OF HAWAI'I

DAVID T. MOYSA and JANE F. MOYSA,
Respondents/Petitioners-Appellees,

vs.

ERIC L. DAVIES and MIRELLA M. DAVIES,
Petitioners/Respondents-Appellants

CERTIORARI TO THE INTERMEDIATE COURT
OF APPEALS
(CIV. NO. 1SS06-1-01393)

ORDER DENYING MOTION
FOR RECONSIDERATION

(By: Moon, C.J., Nakayama, Acoba, and Duffy, JJ. and Circuit Judge Pollack, in place of Recktenwald, J., recused)

Upon reconsideration of the motion for reconsideration of the October 2, 2009 summary disposition order, the papers in support, and the record,

IT IS HEREBY ORDERED that the motion for reconsideration is denied.

DATED: Honolulu, Hawai'i, October 21, 2009.

/s C.J. Moon
/s Paula A. Nakayama
/s Simeon Acoba
/s James E. Duffy Jr
/s Richard W. Pollack

APPENDIX F

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

NO. 28753

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

DAVID T. MOYSA and JANE F. MOYSA,
Petitioners-Appellees, v.
ERIC L. DAVIES and MIRELLA M. DAVIES,
Respondents-Appellants.

APPEAL FROM THE DISTRICT COURT OF THE
FIRST CIRCUIT (CIVIL NO. 1SS06-1-01393)

SUMMARY DISPOSITION ORDER
(By: Recktenwald, C.J., Watanabe and Fujise, JJ.)

Respondents-Appellants Eric L. Davies and Mirella M. Davies (collectively Respondents) appeal from the First Amended Order Granting Petition for Injunction Against Harassment (Amended Order), filed on July 31, 2007 in the District Court of the First Circuit (district court)[1].

The Amended Order stems from a dispute between the Resondents and their neighbors Petitioners-Appellees David T. Moysa and Jane F. Moysa (collectively Petitioners). The Amended Order, inter alia, prohibited the Respondents from "[c]ontacting, threatening, or harassing" the Petitioners. The Amended Order also contained the following special conditions:

[1] The Honorable Phillip Doi presided.

(1) Respondents shall not play any music, sermons, or anything else on a television, stereo, other sound reproduction device such that the sound can be heard thirty (30) feet or more away. The thirty (30) or more feet shall be measured from the point where the sound is audible (a) to the nearest part of the Davies residence, if the sound source is within the Davies residence, or (b) to the sound source, if that source is not within the Davies residence. Notwithstanding anything to the contrary, it shall not be a violation of this injunction with respect to sounds audible within the Davies property. (2) Respondents shall not make any statements to any third party regarding the Petitioners; provided, however, that Respondents may conduct business or file complaints with the homeowner's association.

The Respondents raise the following points of error on appeal:

1 The amended special condition 1 relating to the volume of sound (special condition 1) violates their right to free speech, right to privacy, and is overbroad or vague.

2 The amended special condition 2 relating to communications with third parties (special condition 2) violates their right to free speech, right to a fair trial, and is overbroad.

3 The imposition of the special conditions exceeds the relief prayed for thereby violating Mirella Davies's right to due process.

4 The district court manifested bias and/or prejudice when it amended the special conditions.

5. The district court abused its discretion in imposing the special conditions.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, as well as the

relevant statutory and case law, we resolve the Respondents' points of error as follows:

(1) Special condition 1 is not overly broad or vague and does not violate the Respondents' right of free speech. The restriction on the volume of sound from a device based upon that sound being audible 30 feet from the source does not necessarily violate free speech. In State v. Ewing, 81 Hawai'i 156, 914 P. 2d 549 (App. 1996), this court held that Revised Ordinances of Honolulu (ROH) § 41-31.1, which made it unlawful to play a device for sound reproduction from a vehicle at a volume audible from 30 feet from the source of the sound, was not overbroad so as to infringe upon free speech because it "does not regulate the content of the sound from the reproducing device." Id. at 164, 914 P.2d at 557. The same can be said of special condition 1, which does not restrict the content of the sound, but rather its volume. See Cohen v. California, 403 U.S. 15, 21 (1971) ("government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue").

Special condition 1 does not violate the Respondents' right to privacy. A person cannot reasonably have a privacy interest in that which is exposed to the public. State v. Augafa, 92 Hawai'i 454, 465, 992 P.2d 723, 734 (App. 1999); State v. Texeira, 62 Haw. 44, 49, 609 P.2d 131, 135 (1980). Since special condition 1 only restricts sound that can be heard outside of the Respondents' home, it does not interfere with their right to privacy.

(2) Special condition 2 violates the Respondents' right of free speech because it regulates the content of speech by the Respondents, by prohibiting them from discussing the Petitioners with third parties except in limited circumstances involving the homeowners' association. A

curtailment of the right to free speech based on content is presumptively invalid. See R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992). Special condition 2 is neither narrowly drawn nor necessary to serve a compelling state interest. Statements that are entirely innocuous may nevertheless violate the Amended Order if they involve the Petitioners and are made by the Respondents to a third party.

The presumption of invalidity has not been overcome by the Petitioners. The Petitioners argue that special condition 2 is qualified by the definition of harassment, which requires that the conduct serves no legitimate purpose. See Hawaii Revised Statutes (HRS) § 604-10.5(a)(2). Courts may properly restrict statements made with the intent to harass. See Brekke v. Wills, 125 Cal. App. 4th 1400, 1409 (2005); Thorne v. Bailey, 846 F.2d 241, 243 (4th Cir. 1988) ("Prohibiting harassment is not prohibiting speech, because harassment is not a protected speech. Harassment is not communication, although it may take the form of speech."); see also Garcia v. State, 212 S.W.3d 877, 888-889 (Tex.App. 2006); Test Masters Educ. Servs. v. Singh, 428 F.3d 559, 580 (5th Cir. 2005). However, special condition 2 is not limited only to communications made with the intent to harass, but rather prohibits non-harassing speech as well.

Since we conclude that special condition 2 violates the Respondents' right to free speech, we do not address the effect of special condition 2 on their right to a fair trial.

(3) Mirella Davies was not denied due process of law because special condition 1 was of the kind prayed for in the demand for judgment[2]. The Respondents argue that Mirella Davies was denied due process of law because special

[2] Having determined that special condition 2 violates the Respondents' right to free speech, we do not reach the due process issue as it relates to special condition 2

condition 1 violated Hawai'i District Court Rules of Civil Procedure (DCRCP) Rule 54(c), which requires that a "judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment."

Preliminarily, we note that the DCRCP do not apply to "[a]ctions for relief from harassment maintained pursuant to HRS Section 604-10.5, as the same may be renumbered." DCRCP Rule 81(a)(4). However, the principle underlying DCRCP Rule 54(c) is a requirement of due process. See In re Genesys Data Technologies Inc., 95 Hawai'i 33, 38-39, 18 P.3d 895, 900-01 (2001) .

The Petitioners prayed for injunctive relief against harassment and an award of attorneys' fees and costs. The Petition stated that the harassment included, inter alia, loud noise and music from the Respondents' home. Since special condition 1 enjoins the Respondents from engaging in the harassing behavior of creating noise audible in the Petitioners' home, it appears to fall within the prayer for relief.

Even if special condition 1 did not fall within the relief prayed for, Mirella Davies was not prejudiced by the default because she was represented by counsel at all proceedings after January 4, 2007, which contested the validity of the special conditions. The Amended Order states that "[a]t all subsequent hearings Eric L. Davies and Mirella M. Davies have been represented by Brian B. Custer and Gary L. Hartman." Respondents' opposition to Petitioners' motion for order to show cause was filed on behalf of "Respondents" in the plural by the attorneys for "Respondents." The motion for relief from order and motion for recusal were filed on behalf of both Eric L. Davies and Mirella M. Davies. Thus, Mirella Davies had the opportunity to litigate her interest in this matter in spite of her default on January 4, 2007.

See Bank of Hawaii v. Horworth, 71 Haw. 204, 216, 787 P.2d 674, 681 (1990).

(4) The Respondents failed to establish that the district court judge was biased and/or prejudiced. On August 9, 2007, the Respondents filed a motion for recusal seeking to disqualify Judge Phillip Doi, which was noticed for a hearing on August 24, 2007. The record on appeal does not contain a written order or other disposition of that motion and there is no transcript in the record of any hearing on the motion.

The Respondents rely upon a number of factual bases to support their claim of bias on the part of the district court judge. Several of those allegations either relate to hearings for which the Respondents have not provided transcripts on appeal or discussions which allegedly took place off the record. The Respondents have the burden of presenting the appellate court with a sufficient record to demonstrate the alleged error. Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995); Ling v. Yokoyama, 91 Hawai'i 131, 135, 980 P.2d 1005, 1009 (App. 1999) . The current record before this court is insufficient to show the facts that the Respondents have alleged as the bases for establishing bias on the part of the district court judge. See Ling, 91 Hawai'i at 135, 980 P. 2d at 1009; State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000).

We have reviewed the Respondents' other claimed examples of bias, and they are unsupported by the record or otherwise without merit.

Accordingly, the Respondents fail to demonstrate that the district court judge was biased.

(5) Having determined that special condition 1 did not violate the Respondents' right to privacy, free speech, or due process, we hold that the imposition of special condition 1 was not an abuse of discretion.[3]

Therefore,

IT IS HEREBY ORDERED that the First Amended Order Granting Petition for Injunction Against Harassment filed on July 31, 2007 is vacated with regard to special condition 2, and affirmed in all other respects.

DATED: Honolulu, Hawai'i, May 4, 2009.

On the briefs:
Brian B. Custer and
Gary L. Hartman,
for Respondents-Appellants.

Adrian W. Rosehill,
Stubenberg & Durrett,
for Petitioners-Appellees

/s Mark Recktenwald
Chief Judge

/s Corinne Watanabe
Associate Judge

/s Alexa D. M. Fujise
Associate Judge

---

[3] We do not address whether the district court abused its discretion as it relates to special condition 2 since we determined that special condition 2 violates the Respondents' right to free speech. See Section (2)

APPENDIX G

BRIAN B. CUSTER 5196
947 12th Avenue
Honolulu, Hawai'i 96816
Ph: 732-4046
Attorney for Defendant

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

STATE OF HAWAII	)
vs.	) CR. NO. 07-1-1665
	) HPD NO(S). 07-311244
MIRELLA MAESTRINI	)
DAVIES,	) TRO VIOLATION
	) (Section 604-10.5, H.R.S.)
Defendant	)
	)
	) CR. NO. 07-1-1762
STATE OF HAWAII	) HPD NO(S). 07-327623
vs.	) TRO VIOLATION
	) (Section 604-10.5, H.R.S.)
MIRELLA MAESTRINI	)
DAVIES,	) HPD NO(S). 07-358404
	) DISORDERLY CONDUCT
Defendant	) Section 711-1101(1)(b),
	) (H.R.S.)
	)
	) Telephonic Status
	) Conference Date:
	) February 13, 2009

ORDER GRANTING STIPULATED MOTION FOR CONTINUANCE OF TRIAL

Defendant's Oral Motion to Continue both of the above-named cases until the appeal docketed under SC

No. 28753 has proceeded to final disposition, and State's stipulation to the motion, having come on for telephonic status conference on December 19,2008, before the Honorable Reynoldo D. Graulty, Defendant being represented by Attorney Brian B. Custer, the State being represented by Deputy Prosecuting Attorney Jason Seung Woo, and, and the Court being fully advised in the premises and having orally granted said motion.

IT IS HEREBY ORDERED that the aforesaid motion be and the same is hereby granted.

IT IS HEREBY ORDERED that the parties will hold another telephone status conference on these cases on February 13,2009 at 10:00 a.m.; and

IT IS HEREBY FURTHER ORDERED that for the purposes of Rule 48, H.R.P.P., and speedy trial calculations, the period of delay will be charged to Defendant pursuant to Defendant's attached declaration to this effect.

Dated at Honolulu, Hawaii JAN 13 2009

/s REYNALDO D. GRAULTY
Judge of the above-entitled court

APPROVED AS TO FORM:
"waived"
Jason Seung Woo
Deputy Prosecuting Attorney

APPENDIX H

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 29294

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

CR. NO. 07-1-1665

STATE OF HAWAI'I, Plaintiff-Appellee, v.

MIRELLA MAESTRINI DAVIES, Defendant-Appellant
and

CR. NO. 07-1-1762

STATE OF HAWAI'I, Plaintiff-Appellee, v.

MIRELLA MAESTRINI DAVIES, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE
FIRST CIRCUIT

ORDER DISMISSING APPEAL
FOR LACK OF JURISDICTION

(By: Foley, Presiding Judge, Fujise and Leonard, JJ.)

Upon review of the record for this consolidated case, it appears that we lack jurisdiction over Defendant-Appellant Mirella Maestrini Davies'. (Appellant Davies) appeal from the Honorable Reynaldo Graulty's June 20, 2008 "Order Granting Defendant's Motion for Interlocutory Appeal and to Continue" (the June 20, 2008 order denying motions to dismiss and granting leave to file an interlocutory appeal), because Appellant Davies's appeal is not timely under Rule 4(b) (1) of the Hawai'i Rules of Appellate Procedure (HRAP).

Appellant Davies is appealing from the interlocutory June 20, 2008 order denying motions to dismiss and granting leave to file an interlocutory appeal pursuant to Hawaii Revised statutes (HRS) HRS § 641-17 (Supp. 2007), which authorizes interlocutory appeals:

> § 641-17. Interlocutory appeals from circuit courts, criminal matters
>
> Upon application made within the time provided by the rules of court, an appeal in a criminal matter may be allowed to a defendant from the circuit court to the intermediate appellate court, subject to chapter 602, from a decision denying a motion to dismiss or from other interlocutory orders, decisions, or judgments, whenever the judge in the judge's discretion may think the same advisable for a more speedy termination of the case. The refusal of the judge to allow an interlocutory appeal to the appellate court shall not be reviewable by any other court.

HRS § 641-17 (Supp. 2007) (emphases added). Pursuant to HRAP Rule 4(b)(1),

> [i]f a defendant in a criminal case seeks to take an interlocutory appeal from a circuit court order, it is necessary for the defendant to move for an order allowing the interlocutory appeal, for the circuit court to enter the certification order, and for the defendant to file the notice of interlocutory appeal all within 3 0 days from the date the order appealed from is entered, unless the time for appeal is extended pursuant to HRAP [Rule] 4(b).

State v. Irvine, 88 Hawai'i 404, 406, 967 P.2d 236, 238 (1998).

Appellant Davies did not file her August 6, 2008 notice of appeal within thirty days after entry of the June 20, 2008 order denying motions to dismiss and granting leave to file an interlocutory appeal, as HRAP Rule 4(b)(1) requires. The circuit court did not expressly extend the time period for filing a notice of appeal pursuant to HRAP Rule 4(b)(5). Therefore, Appellant Davies's appeal is untimely.

"In criminal cases, [the supreme court] ha[s] made exceptions to the requirement that notices of appeal be timely filed." State v. Irvine, 88 Hawai'i at 407, 967 P.2d at 239. The "recognized exceptions involve circumstances where: (1) defense counsel has inexcusably or ineffectively failed to pursue a defendant's appeal from a criminal conviction in the first instance[,] . . . or (2) the trial court's decision was unannounced and no notice of the entry of judgment was ever provided[.]" Id. (citations omitted). Nevertheless, Appellant Davies does not qualify for either of these two possible exceptions, because (1) the circuit court has not entered a judgment of conviction against Appellant Davies, and (2) the record shows that the circuit court provided the parties with notice of the June 20, 2008 order denying motions to dismiss and granting leave to file an interlocutory appeal.

"[C]ompliance with the requirement of the timely filing of a notice of appeal, as set forth in HRAP Rule 4(b)(1), is jurisdictional." State v. Bohannon, 102 Hawai'i 228, 234, 74 P.3d 980, 986 (2003) (citation, internal quotation marks, and original brackets omitted). When a party fails to file a timely interlocutory appeal pursuant to HRS § 641-17 (Supp. 2007), appellate jurisdiction fails to exist. State v. Irvine, 88 Hawai'i at 407, 967 P.2d at

239. Therefore, we lack appellate jurisdiction and this untimely appeal must be dismissed.

Accordingly,

IT IS HEREBY ORDERED that this appeal is dismissed for lack of jurisdiction.

DATED: Honolulu, Hawai'i, November 28, 2008.

/s Daniel R Foley
Presiding Judge

/s Alexa D. M. Fujise
Associate Judge

/s Katherine Leonard
Associate Judge

APPENDIX I

BRIAN B. CUSTER 5196
947 12th Avenue
Honolulu, Hawai'i 96816
Ph: 732-4046
Attorney for Defendant

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI'I

STATE OF HAWAII	)
vs.	) CR. NO. 07-1-1665
	) HPD NO(S). 07-311244
MIRELLA MAESTRINI	)
DAVIES,	) TRO VIOLATION
	) (Section 604-10.5, H.R.S.)
Defendant	)
	)
	) CR. NO. 07-1-1762
STATE OF HAWAII	) HPD NO(S). 07-327623
vs.	) TRO VIOLATION
	) (Section 604-10.5, H.R.S.)
MIRELLA MAESTRINI	)
DAVIES,	) HPD NO(S). 07-358404
	) DISORDERLY CONDUCT
Defendant	) Section 711-1101(1)(b),
	) (H.R.S.)
	)
	)

ORDER GRANTING DEFENDANT'S MOTION FOR INTERLOCUTORY APPEAL AND TO CONTINUE

Defendant MIRELLA MAESTRINI DAVIES's Motions to Dismiss and/or Continue both the Pre-Trial

Motions Deadlines and/or Trial Weeks in Cr. No. 07-1-1665 as well as Cr. No. 07-1-1762 came on to hearing before the Honorable REYNALDO GRAULTY on June 2, 2008. Present for this hearing were Deputy Prosecuting Attorney LAURA MAESHIRO, and BRIAN CUSTER, privately retained Attorney for Defendant Defendant MIRELLA MAESTRINI DAVIES's presence was waived pursuant to HRPP Rule 43.

The Court having heard the representation of bom counsels, and being fully apprised of all relevant facts and circumstances granted Defendant's motions to continue both cases as well as for an interlocutory appeal.

IT IS HEREBY ORDERED that

1. both Motions to Dismiss are denied;

2. however, due to both judicial economy as well as the Circuit Court's lack of Jurisdiction to consider the unconstitutionality of both special conditions (contained in the injunction in question), this Court hereby grants Defendant's Motions for interlocutory appeals in both cases (to allow the appellate court to properly exercise their jurisdiction and, thereby determine these questions);

3. prior to said interlocutory appeal being filed, Defendant is to draft, file and serve subpoena duces

tecum on the Honolulu Police Department, with a return date set for June 30,2008 at 2:00 o'clock pm.; further

4. both cases are also set for a status hearing on July 28.2008 at 10:30 a.m.

Dated at Honolulu, Hawaii June 10, 2008

/s Renaldo Graulty
The Honorable Renaldo Grualty
JUDGE OF THE ABOVE –ENTITLED COURT

APPROVED AS TO FORM:
[Signature waived on the record]
DEPUTY PROSECUTING ATTORNEY

APPENDIX J

STUBENBERG & DURRETT
ADRIAN W. ROSEHILL 3868
Davies Pacific Center
841 Bishop Street, Suite 702
Honolulu, Hawaii 96813
Telephone: (808) 526-0892
Facsimile: (808) 533-4399

Attorney for Petitioners

IN THE DISTRICT COURT
OF THE FIRST CIRCUIT

WAIALUA DIVISION

STATE OF HAWAII

DAVID T. MOYSA	) CIVIL NO. 1SS06-1-01393
JANE F. MOYSA,	) ORDER GRANTING
Petitioners,	) PETITIONERS' MOTION
	) TO AMEND ORDER
vs.	) GRANTING PETITION
	) FOR INJUNCTION
ERIC L. DAVIES	) AGAINST HARASSMENT
MIRELLA M. DAVIES	)
66-341F Kaamooloa Rd.	) HEARING:
Waialua, HI 96791	) Date: July 31, 2007
Respondents.	) Time: 1:30 p.m.
	) Date: July 31, 2007
	) Judge: The Honorable
	) Phillip Doi

ORDER GRANTING PETITIONERS' MOTION TO AMEND ORDER GRANTING PETITION FOR INJUNCTION AGAINST HARASSMENT

Petitioners DAVID T. MOYSA and JANE F. MOYSA (the "Moysas"), Motion to Amend Order Granting Petition for Injunction Against Harassment, filed on July 3, 2007 ("the Motion"), came on for hearing on Tuesday, July 31, 2007 at 1:30 p.m., before the Honorable Phillip Doi. Adrian W. Rosehill appeared on behalf of the Moysas, and Gary L. Hartman and Brian B. Custer appeared on behalf of Respondents ERIC L. DAVIES and MIRELLA M. DAVIES (the "Davies"). The Court having considered the Motion, the Davies' memorandum in opposition, the arguments of counsel at the hearing, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Moysas' Motion to Amend Order Granting Petition for Injunction Against Harassment, filed on July 3, 2007, is granted. Attached hereto as Exhibit "1" is a true and correct copy of the First Amended Order Granting Petition for Injunction Against Harassment filed in open court on July 31, 2007 at 4:11 p.m. (the "Amended Injunction Order"), the terms of which are incorporated herein by reference. The Amended Injunction Order shall take effect on August 2, 2007 at 5:00 p.m.

DATED: Honolulu, Hawaii; August 21, 2007

APPROVED AND SO ORDERED

/s Philip Doi

JUDGE OF THE ABOVE AND ENTITILED COURT

APPROVED AS TO FORM:
GARY L. HARTMAN
BRIAN B. CUSTER
Attorneys for Respondents
ERIC L. DAVIES
MIRELLA M. DAVIES

APPENDIX K

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Attorney for Petitioners

IN THE DISTRICT COURT
OF THE FIRST CIRCUIT

WAIALUA DIVISION

STATE OF HAWAII

DAVID T. MOYSA JANE F. MOYSA, Petitioners, vs. ERIC L. DAVIES MIRELLA M. DAVIES 66-341F Kaamooloa Rd. Waialua, HI 96791 Respondents.	) CIVIL NO. 1SS06-1-01393)) ORDER DENYING) RESPONDENTS' MOTION) FOR RELIEF FROM) INJUNCTION PURSUANT) TO DCRCP RULE 60(b))) HEARING:) Date: July 31, 2007) Time: 1:30 p.m.) Date: July 31, 2007) Judge: The Honorable) Phillip Doi

ORDER DENYING RESPONDENTS' MOTION FOR RELIEF FROM ORDER FOR INJUNCTION PURSUANT TO DCRCP RULE 60(b)

Respondents ERIC L. DAVIES and MIRELLA M. DAVIES (the "Davies") Motion for Relief From Order for Injunction Pursuant to DCRCP Rules 60(b) (the "Motion"), filed on July 3, 2007 ("the Motion"), came on for hearing on Tuesday, July 31, 2007 at 1:30 p.m., before the Honorable Phillip Doi. Adrian W. Rosehill appeared on behalf of DAVID T. MOYSA and JANE F. MOYSA (the "Moysas"), and Gary L. Hartman and Brian B. Custer appeared on behalf of the Davies. The Court having considered the Motion, the Davies' Reply Memo, the Moysas' memorandum in opposition, the arguments of counsel at the hearing, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Davies' Motion for Relief From Order for Injunction Pursuant to DCRCP Rules 60(b), filed on July 3, 2007, is denied.

DATED: Honolulu, Hawaii; August 21, 2007

APPROVED AND SO ORDERED

/s Philip Doi

JUDGE OF THE ABOVE AND ENTITLED COURT

APPROVED AS TO FORM:
GARY L. HARTMAN
BRIAN B. CUSTER
Attorneys for Respondents
ERIC L. DAVIES
MIRELLA M. DAVIES

APPENDIX L

Filed in Open Court
Date and Time: January 4,2007 (11:50am)
Clerk: G. HALL

IN THE DISTRICT COURT OF THE FIRST CIRCUIT STATE OF HAWAI'I

David T. Moysa)
Jane F. Moysa,) Civil No. 1SS06-1-01393
PETITIONER(S).)
) ORDER GRANTING
vs.) PETITION FOR
) INJUNCTION
AGAINST
Eric L. Davies) HARASSMENT
Mirella M. Davies)
RESPONDENT(S).)

ORDER GRANTING PETITION FOR INJUNCTIONAGAINST HARASSMENT

The Petition, having come on for hearing at 8:30am on **January 4, 2007 before the Honorable Philip Doi,** District Judge of the First Circuit at the Honolulu Division of the District Court of the First Circuit.

with Petitioner(s) appearing:

__ pro se
x with Counsel, Adrian RosehilL Esq.

and Respondent: Eric L. Davies:

x appearing pro se

and Respondent: Mirella M. Davies

x having been duly served, but failing to appear for hearing on the Petition,

The Court having reviewed the Petition and.

___ upon failure of Respondent(s) to appear.

___ Respondent(s) having stipulated to the granting of the First Amended Order Granting Petition for Injunction Against Harassment, and no findings of fact having been made.

x Evidence having been adduced thereon and the Court having found the allegations of the Petition proven by clear and convincing evidence.

x Petitioner(s) and Respondent Eric L. Davies having been served with a copy of this Order in open court.

___ Respondent(s) having been present and orally informed of the terms and conditions of the Order, but having departed from the courtroom before being served with a a copy of this Order in open court, in violation of the Court's directive to remain in the courtroom until service is made.

The Court has jurisdiction over the parties and this matter and Respondent(s) was/were provided notice and given a full and fair opportunity to be heard.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Petition Against Harassment is granted in this matter.

2. Respondent(s) and any other person acting on behalf of Respondent(s) are hereby restrained and enjoined from:

A. Contacting, threatening or harassing Petitioner(s). "Contacting" is defined to include but is not limited to the telephone, mail, facsimile, pager, electronic mail, internet, etc.

B. Contacting, threatening or harassing any person(s) residing at Petitioner(s)' residence.

C. Entering and/or visiting Petitioner(s)' residence, including yard and garage, and/or place of Petitioner(s)' employment.

3. The parties or their attorneys shall not be precluded from serving court documents upon each other through certified mail, registered mail, the Honolulu Police Department, or an authorized process server.

4 This injunction shall be effective as of **January 4, 2007** and shall remain in full force and effect for a period of **3 years** from said date unless terminated or modified by appropriate order of this Court.

5. Special conditions or modifications: (1) Respondents shall not play any music, sermons, or anything else on a television, stereo or other sound reproduction device such that the sound can be heard on the Petitioner's property at a level greater than 55 decibels during the hours of 7:00a.m. to 10:00p.m., or at a level greater than 45 decibels during the hours of 10:00p.m. to 7:00a.m., as provided by Hawaii Administrative Rules section 11-46-4. (2) Respondents shall not make any statements to any third party regarding the Petitioners; provided, however, that Respondents may conduct business or file complaints with the homeowner's association.

6 X Court costs are awarded to Petitioner(s).
X Reasonable attorney's fees are awarded to Petitioner(s).

7 **WHILE THIS INJUNCTION ORDER IS IN EFFECT, RESPONDENT(S) IS/ARE PROHIB-**

ITED FROM POSSESSING, CONTROLLING, OR TRANSFERRING ANY FIREARM OR AMMUNITION. ANY FIREARM OR AMMUNITION IN THE POSSESSION OR CONTROL OF RESPONDENT(S) MUST BE IMMEDIATELY TURNED OVER TO THE HONOLULU POLICE DEPARTMENT FOR SAFEKEEPING UNTIL THIS INJUNCTION ORDER IS NO LONGER IN EFFECT.

8. ANY KNOWING OR INTENTIONAL VIOLATION OF THIS ORDER AGAINST HARASSMENT IS A MISDEMEANOR PURSUANT TO HRS SECTION 604-10.5, WHICH MAY BE PUNISHABLE BY IMPRISONMENT OF UP TO ONE (1) YEAR AND/OR A FINE OF UP TO $2,000, AND ALLOWS THE OFFICE OF THE PROSECUTING ATTORNEY TO PROSECUTE SUCH VIOLATIONS. IN ADDITION, ANY VIOLATION OF THE FIREARM AND AMMUNITION ORDER SHALL BE PUNISHABLE AS A MISDEMEANOR OFFENSE UNDER SECTION 134-7 OF THE HAW AIT REVISED STATUTES.

9. THIS INJUNCTION ORDER IS ENFORCEABLE IN ALL 50 STATES, DISTRICT OF COLUMBIA, U.S. TERRITORIES, AND TRIBAL LANDS. [18 USC SECTION 2265]. INTERSTATE VIOLATION OF THIS ORDER IS SUBJECT TO FEDERAL CRIMINAL PROSECUTION. [18 USC SECTIONS 2261(g), 2261A AND 2262].

TO ANY POLICE OFFICER OR OTHER OFFICER OF JUSTICE:

YOU ARE HEREBY ORDERED TO ARREST RESPONDENT(S) IF YOU OBSERVE AND/OR HAVE PROBABLE CAUSE TO BELIEVE THAT,

DURING THE PERIOD STATED IN PARAGRAPH 4 HEREIN, RESPONDENT(S) HAS/HAVE VIOLATED ANY PROVISION OR CONDITION OF THIS ORDER.

Dated: HONOLULU, Hawai'i, July 31, 2007.

/s Philip Doi

Judge of the above entitled Court

APPENDIX M

Constitutional and Statutory Provisions

The First Amendment to the United States Constitution provides in relevant part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech"

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be ... deprived of life, liberty, or property without due process of law"

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

The Ninth Amendment to the United States Constitution provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Section 1 of **the Fourteenth Amendment** to the United States Constitution provides in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Hawaii Revised Statute "HRS" §604-10.5 provides

§604-10.5 Power to enjoin and temporarily restrain harassment. (a) For the purposes of this section:

"Course of conduct" means a pattern of conduct composed of a series of acts over any period of time evidencing a continuity of purpose.

"Harassment" means:

(1) Physical harm, bodily injury, assault, or the threat of imminent physical harm, bodily injury, or assault; or

(2) An intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer emotional distress.

(b) The district courts shall have power to enjoin or prohibit or temporarily restrain harassment.

(c) Any person who has been subjected to harassment may petition the district court of the district in which the petitioner resides for a temporary restraining order and an injunction from further harassment.

(d) A petition for relief from harassment shall be in writing and shall allege that a past act or acts of harassment may have occurred, or that threats of harassment make it probable that acts of harassment may be imminent; and shall be accompanied by an affidavit made under oath or statement made under penalty of perjury stating the specific facts and circumstances from which relief is sought.

(e) Upon petition to a district court under this section, the court may temporarily restrain the person or persons named in the petition from

harassing the petitioner upon a determination that there is probable cause to believe that a past act or acts of harassment have occurred or that a threat or threats of harassment may be imminent. The court may issue an ex parte temporary restraining order either in writing or orally; provided that oral orders shall be reduced to writing by the close of the next court day following oral issuance.

(f) A temporary restraining order that is granted under this section shall remain in effect at the discretion of the court for a period not to exceed ninety days from the date the order is granted. A hearing on the petition to enjoin harassment shall be held within fifteen days after the temporary restraining order is granted. In the event that service of the temporary restraining order has not been effected before the date of the hearing on the petition to enjoin, the court may set a new date for the hearing; provided that the new date shall not exceed ninety days from the date the temporary restraining order was granted.

The parties named in the petition may file or give oral responses explaining, excusing, justifying, or denying the alleged act or acts of harassment. The court shall receive all evidence that is relevant at the hearing, and may make independent inquiry.

If the court finds by clear and convincing evidence that harassment as defined in paragraph (1) of that definition exists, it may enjoin for no more than three years further harassment of the petitioner, or that harassment as defined in paragraph (2) of that definition exists, it shall enjoin for no more than three years further harassment of the petitioner; provided that this paragraph shall not prohibit the court from issuing other injunctions against the

named parties even if the time to which the injunction applies exceeds a total of three years.

Any order issued under this section shall be served upon the respondent. For the purposes of this section, "served" shall mean actual personal service, service by certified mail, or proof that the respondent was present at the hearing in which the court orally issued the injunction.

Where service of a restraining order or injunction has been made or where the respondent is deemed to have received notice of a restraining order or injunction order, any knowing or intentional violation of the restraining order or injunction order shall subject the respondent to the provisions in subsection (h).

Any order issued shall be transmitted to the chief of police of the county in which the order is issued by way of regular mail, facsimile transmission, or other similar means of transmission.

(g) The court may grant the prevailing party in an action brought under this section, costs and fees, including attorney's fees.

(h) A knowing or intentional violation of a restraining order or injunction issued pursuant to this section is a misdemeanor. The court shall sentence a violator to appropriate counseling and shall sentence a person convicted under this section as follows:

(1) For a violation of an injunction or restraining order that occurs after a conviction for a violation of the same injunction or restraining order, a violator shall be sentenced to a mandatory minimum jail sentence of not less than forty-eight hours; and

(2) For any subsequent violation that occurs after a second conviction for violation of the same injunction or restraining order, the person shall be

sentenced to a mandatory minimum jail sentence of not less than thirty days.

The court may suspend any jail sentence, except for the mandatory sentences under paragraphs (1) and (2), upon appropriate conditions, such as that the defendant remain alcohol and drug-free, conviction-free, or complete court-ordered assessments or counseling. The court may suspend the mandatory sentences under paragraphs (1) and (2) where the violation of the injunction or restraining order does not involve violence or the threat of violence. Nothing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions authorized in sentencing for a misdemeanor offense.

(i) Nothing in this section shall be construed to prohibit constitutionally protected activity. [L 1986, c 69, §1; am L 1992, c 291, §1; am L 1993, c 215, §3; am L 1996, c 245, §1; am L 1999, c 143, §1]

Hawaii Rules of Appellate Procedure (HRAP) provides in relevant part

Rule 4. APPEALS - WHEN TAKEN.

(a) Appeals in civil cases.

(1) TIME AND PLACE OF FILING. When a civil appeal is permitted by law, the notice of appeal shall be filed within 30 days after entry of the judgment or appealable order.

The notice of appeal shall be filed with the clerk of the court from which the appeal is taken. If a notice of appeal is mistakenly filed with the appellate clerk, the appellate clerk shall note on it the date of receipt and shall transmit the notice to the clerk of the court appealed from. The date of receipt by the appellate clerk

shall be deemed to be the date the notice of appeal was filed with the clerk of the court.

(2) PREMATURE FILING OF APPEAL. ...

(3) TIME TO APPEAL AFFECTED BY POST- JUDGMENT MOTIONS. ...

(4) EXTENSIONS OF TIME TO FILE THE NOTICE OF APPEAL.

(A) Requests for extensions of time before expiration of the prescribed time. The court or agency appealed from, upon a showing of good cause, may extend the time for filing a notice of appeal upon motion filed within the time prescribed by subsections (a)(1) through (a)(3) of this rule. However, no such extension shall exceed 30 days past such prescribed time. An extension motion that is filed before the expiration of the prescribed time may be ex parte unless the court or agency otherwise requires.

(B) Requests for extensions of time after expiration of the prescribed time. The court or agency appeal from, upon a showing of excusable neglect, may extend the time for filing the notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by subsections (a)(1) through (a)(3) of this rule. However, no such extension shall exceed 30 days past the prescribed time. Notice of an extension motion filed after the expiration of the prescribed time shall be given to the other parties in accordance with the rules of the court or agency appealed from.

(5) ENTRY OF JUDGMENT OR ORDER DEFINED. A judgment or order is entered when it is filed in the office of the clerk of the court.

Revised Ordinances of Honolulu ("ROH") provides in relevant part

Sec. 41-34.1 Findings and policy.

The Waikiki Shell is a premier forum for outdoor concerts and activities and since 1953 has provided an idyllic setting. The city is concerned and desirous of ensuring that the peace and quiet enjoyed by nearby residents is not unduly disturbed by the events held at the Shell, while at the same time it wishes to continue to provide a venue for quality entertainment and events in the uniquely beautiful setting that is the Shell.

....

Sec. 41-34.3 Sound level limits.

(a) Sound levels for events at the Shell, whether amplified or not, shall not exceed 68 dBA for more than 10 percent of the time within any 20-minute period as measured at or near the New Otani Kaimana Beach Hotel at the makai side of Kalakaua Avenue in areas zoned Apartment/Hotel/Business and shall apply from ground level to a perpendicular plane projected above the height of the highrise buildings.
(b) Sound level limits established in subsection (a) of this section shall be applicable between the hours of seven a.m. through 10 p.m. of the same day.
(c) Under no circumstances shall a tenant or performer allow events within their control to continue after 10 p.m.

Hawaii Administrative Rules provides in relevant part

§11-46-4 Maximum permissible sound levels in dBA.

(a) The maximum permissible sound levels specified in Table 1, as provided in this subsection and in section 11-46-3, shall apply to the following excessive noise sources: stationary noise sources; and equipment related to agricultural, construction, and industrial activities.

Table 1. Maximum permissible sound levels in dBA.

Zoning Districts	Daytime (7am to 10pm)	Nighttime (10pm to 7am)
Class A	55	45
Class B	60	50
Class C	70	70

(b) The maximum permissible sound levels in Table 1, as provided in subsection (a), shall apply to any excessive noise source emanating within the specified zoning district, and at any point or beyond (past) the property line of the premises in a manner deemed appropriate by the director

(c) Noise levels shall not exceed the maximum permissible sound levels for more than ten percent of the time within any twenty minute period, except by permit or variance issued under sections 11-46-7 and 11-46-8.

(d) ...

(e) The maximum permissible sound level for impulsive noise shall be ten dBA above the maximum permissible sound levels specified in Table 1 of

subsection (a). "Fast" meter response shall be used to measure these types of noise

§11-46-9 Measurement of sound levels.

...

(c) For the purpose of this chapter, sound level measurements shall be conducted using standard procedures, with sound level meters, using the "A" weighting network and "slow" meter response unless otherwise stated.

(d) Sound level meters and calibrators shall conform to specifications provided in the American National Standard, ANSI S1.4-1983, specification for sound level meters.

(e) Windscreens shall be used whenever appropriate.

(f) The various factors affecting the accuracy of a measurement shall be evaluated to the extent necessary for the implementation of this chapter. For example, if the accuracy with which a measurement can be made with specific instruments at a specific location is plus or minus two dBA, then any measure sound level greater than the specified maximum permissible sound level, plus two dBA, will indicate that excessive noise has been emitted.

(g) Measurements shall normally not be used for enforcement unless the noise level at a point of measurement is more than three decibels greater than the ambient or background noise level.

(h) The ambient noise level may be estimated from sound levels measured during nonoperation of the noise source or by sound level measurements at one or more points near the measurement where the noise source is inaudible.

U.S.
MAR 8 - 2010

No. 09-799

IN THE

Supreme Court of the United States

ERIC L. DAVIES AND MIRELLA M. DAVIES,

Petitioners,

v.

DAVID T. MOYSA AND JANE F. MOYSA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF IN OPPOSITION

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Counsel for Respondents

QUESTIONS PRESENTED

I. Whether the Petition should be dismissed for lack of jurisdiction since the amended injunction order expired by its own terms on January 4, 2010.

II. Whether Petitioners have presented compelling reasons to grant the Petition, where the decision of the Intermediate Court of Appeals affirming the State of Hawaii district court's entry of the amended injunction order does not conflict with a decision of this Court or a Court of Appeals, or implicates an important federal question that has not been settled by this Court.

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INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for Writ of *Certiorari* to be granted (the "Petition") *See* Sup. Ct. R. 10. Specifically, Petitioners fail to demonstrate that the Summary Disposition Order of the Intermediate Court of Appeals (Pet. App. F) and the Summary Disposition Order of the Hawaii Supreme Court (Pet. App. B) are in conflict with a decision of this Court or another Court of Appeals or that the Hawaii Appellate Courts decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

I. Procedural History

On November 2, 2006, Respondents filed with the District Court of the First Circuit, Honolulu Division, State of Hawaii, a Petition for *Ex Parte* Temporary Restraining Order and for Injunction Against Harassment against Petitioners Eric L. Davies and Mirella M. Davies. On November 8, 2007, Petitioners filed a separate a Petition for Ex Parte Temporary Restraining Order and for Injunction Against Harassment. Hearings on the petitions were conducted, and on January 4, 2007 the district court denied the Petitioners' petition for TRO, and, at the same time, the court issued an order granting petition for injunction against harassment in favor of the Respondents. At that

time, default was entered against Petitioner Mirella M. Davies for failing to appear at the hearings.

The Order Granting Petition for Injunction Against Harassment filed January 4, 2007, stated in pertinent part:

> 2. Respondent(s) [the Davies] and any other person acting on behalf of Respondent(s) are hereby retrained and enjoined from:
>
> A. Contacting, threatening or harassing Petitioner(s). Contacting is defined to include but is not limited to the telephone, mail, facsimile, pager, electronic mail, internet, etc.
>
> B. Contacting, threatening or harassing any person(s) residing at Petitioner's residence.
>
> C. Entering and/or visiting Petitioner(s)' residence, including yard and garage, and/or place of Petitioner(s)' employment.
>
> * * * * *
>
> 5. *Special conditions or modifications:* (1) Respondents shall not play any music, sermons or any else on a

> television, stereo, or other sound reproduction device such that the sound can be heard on the Petitioner's property at a level greater than 55 decibels during the hours of 7:00 a.m. to 10:00 p.m., or at a level greater than 45 decibels during the hours of 10:00 p.m. to 7:00 a.m. as provided by Hawai'i Administrative Rules Section 11-46-4. (2) Respondents shall not make any statements to any third party regarding the Petitioner; provided, however, that Respondents may conduct business or file complaints with the homeowner's association.

The injunction was effective as of January 4, 2007 and remained in effect for a period of three years, or until January 4, 2010.

Due to repeated violations of the Injunction Order, Respondents filed a Motion for Issuance of Order to Show Cause on May 22, 2007.

On July 3, 2007, Petitioners filed a motion seeking to have the special conditions of the January 4th injunction order voided by the Court. On the same date, Respondents filed a motion to amend the injunction order, requesting the district court amend the injunction order to replace the 55 db limitation with a 30' distance limitation.

On July 31, 2007, the district court entered the First Amended Order Granting Petition for

Injunction Against Harassment. The amended injunction order, inter alia, prohibited the Petitioners from "[c]ontacting, threatening, or harassing" the Respondents. The amended order also contained the following special conditions:

> (1) Respondents [Davies] shall not play any music, sermons, or anything else on a television, stereo, other sound reproduction device such that the sound can be heard thirty (30) feet or more away. The thirty (30) or more feet shall be measured from the point where the sound is audible (a) to the nearest part of the Davies residence, if the sound source is within the Davies residence, or (b) to the sound source, if that source is not within the Davies residence. Notwithstanding anything to the contrary, it shall not be a violation of this injunction with respect to sounds audible within the Davies property. (2) Respondents [Davies] shall not make any statements to any third party regarding the Petitioners [Moysas]; provided, however, that Respondents [Davies] may conduct business or file complaints with the homeowner's association.

The amended injunction order was effective from January 4, 2007 for a period of three years until January 4, 2010.

By separate orders entered on August 21, 2007, the District Court denied Petitioners' Motion for Relief from Order for Injunction, and granted

Respondents' Motion to Amend Order Granting Petition for Injunction Against Harassment.

On September 19, 2007, Petitioners filed their Notice of Appeal. On May 4, 2009, the Intermediate Court of Appeals of the State of Hawaii issued a Summary Disposition Order finding that special condition 1 of the amended injunction order was not overly broad or vague, did not violate Petitioners' right of free speech, did not restrict or regulate the content of the sound but rather the volume, and did not violate the Petitioners' right to privacy. The court further held that Petitioner Mirella M. Davies was not denied her due process rights. The court, however, did conclude that special condition 2 violated the Petitioners' free speech rights as it prohibited non-harassing speech.

A Motion for Reconsideration of the Summary Disposition Order was denied by the Intermediate Court of Appeals on May 11, 2009. Petitioners' Motion for Fees and Costs on Appeal was also denied.

The Petitioners subsequently filed an Application for Writ of Certiorari requesting that the Hawaii Supreme Court review that part of the Summary Disposition Order of the Intermediate Court of Appeals that concluded that the Davies' right of free speech was not violated by special condition 1 of the amended injunction order. Petitioners' application was accepted by the Hawaii Supreme Court, and the matter set for oral argument on September 3, 2009.

On October 2, 2009, the Hawaii Supreme Court issued a Summary Disposition Order concluding that since the Petitioners' did not timely appeal the July 31, 2007 amended injunction order, the ICA lacked jurisdiction to decide the issue of whether special condition 1, as amended, violated the Davies' right of free speech. As a result, the Supreme Court held that special condition 1, as amended, stood.

On October 12, 2009, the Petitioners filed a Motion for Reconsideration asking the Hawaii Supreme Court to reconsider its October 2nd Summary Disposition Order. By order filed on October 21, 2009, the Hawaii Supreme Court denied the Motion for Reconsideration. On October 22, 2009, the Judgment on Appeal was filed by the Hawaii Supreme Court.

On November 12, 2009, Petitioners filed a Petition for Writ of Mandamus with the Supreme Court of the State of Hawaii. On December 7, 2009, the Hawaii Supreme Court denied mandamus relief to the Petitioners.

On December 24, 2009, Petitioners filed this Petition for Writ of Certiorari.

II. Facts Relevant to the Petition

A. The appeal to the Intermediate Court of Appeals and the Supreme Court of the State of Hawaii arose from a dispute between neighboring home owners which led the filing of competing petitions for injunctions in the state district court.

On January 4, 2007, an Order Granting Petition for Injunction Against Harassment was issued in favor of Respondents [the Moysas], and against the Petitioners [the Davies]. The injunction order was entered by the district court after a lengthy hearing conducted over days which recounted repeated instances of harassing behavior by the Davies against the Moysas and others in the neighborhood which included the playing of music, religious sermons and other sounds at a loud volume for hours on end, Petitioner Mirella M. Davies staring and walking back and forth in front of the Respondents' property, and other bizarre behavior. Numerous witnesses, including various neighbors and contractors who were familiar with the Davies and their conduct, testified in support of the Moysas for issuance of an injunction. In contrast, the Davies called no corroborating witnesses to support their claims.

B. On July 3, 2007, Petitioners filed a motion seeking to have the special conditions of January 4th injunction order voided by the Court. On July 3, 2007, Respondents filed a motion to amend the injunction order to replace the 55 db limitation with a 30' distance limitation. Amendment of the injunction order was sought as a result of the Davies' challenging the order contending that state law required certification and training for use of a sound meter, and as a result of the police refusing to enforce the injunction order since the Moysas were not certified to operate a decibel meter. Since special condition 1 of the injunction order could not be enforced as written, and since the Davies continued to violate the order

with impunity[1] knowing they would not be subject to arrest for playing their music at an excessive volume, modification of the injunction order was necessary.

C. On July 31, 2007, the district court entered the amended injunction order enjoining the Petitioners from playing any music, sermons or anything else on a sound reproduction device that could be heard at a distance of 30' or more. By separate orders entered on August 21, 2007, the district court denied Petitioners' motion for relief , and granted Respondents' motion to amend order granting petition for injunction against harassment. The Petitioners appealed these orders.

III. The Opinions of the Hawaii Courts of Appeal

A. The May 4, 2009 Summary Disposition Order of the Intermediate Court of Appeals (Pet. App. F) concluded that the Petitioners' right of free speech was not violated by special condition 1 of the district court's July 31, 2007 amended injunction order, which was entered pursuant to a motion to

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[1] The record on appeal to the Intermediate Court of Appeals of the State of Hawaii demonstrated that the Davies repeatedly violated the injunction by playing there music and sermons, over and over, for hours at a time, on numerous days, at volumes which exceeded the decibel levels set forth in the injunction order. Visitors to the Moysas and their neighbors uniformly stated that the music or sermons were directed at the Moysas residence, it was played at an extremely loud volume, and occurred when the Moysas were home, in their yard or entertaining friends, and stopped when the Moysas left their home, clear evidence that the Davies were targeting their harassment in violation of the injunction order.

amend the original injunction order. The Summary Disposition Order also addressed issues raised by the district court's August 21, 2007 order denying Petitioners' motion for relief from the original injunction order. The July 31, 2007 amended injunction order amended special condition 1 (pursuant to the motion to amend) by changing the measurement of sound from decibels to distance. The July 31, 2007 amended injunction order disposed of all issues raised in the motion to amend and thereby left nothing further to be accomplished with regard to the amendment of special condition 1. As the Hawaii Supreme Court correctly concluded, the July 31, 2007 amended injunction order was final and appealable under *Hawaii Revised Statutes ("HRS")* § 641-1(a) (Supp. 2007). *See Ditto v. McCurdy*, 103 Hawai'i 153, 157-58, 80 P.3d 974, 978-79 (2003); *Chun v. Bd. of Trustees of E.R.S.*, 92 Hawai'i 432, 447-48, 992 P.2d 127, 142-43 (2000). (Pet. App. B) Likewise, the district court's August 21, 2007 order denying Petitioners' motion for relief was also final and appealable under *HRS § 641-1(a)*.

B. The time for appealing the July 31, 2007 amended injunction order commenced upon entry of the order, and not upon entry of the August 21, 2007 order granting the motion to amend. The Petitioners' September 19, 2007 notice of appeal was filed within thirty days after entry of the August 21, 2007 order denying the motion for relief, but more than thirty days after entry of the July 31, 2007 amended injunction order. While the September 19, 2007 notice of appeal timely appealed the August 21, 2007 order denying the motion for relief, it did not timely appeal the July 31, 2007 amended injunction

order. *See Hawai'i Rules of Appellate Procedure* ("HRAP") Rule 4.(a)(1). The timely filing of a notice of appeal in a civil case is a jurisdictional requirement that cannot be waived by the parties or disregarded by the appellate court in the exercise of judicial discretion. *See Bacon v. Karlin*, 68 Hawai'i. 648, 650, 727 P.2d 1127, 1128 (1986); HRAP 26(b). (Pet. App. B)

C. The Intermediate Court of Appeals ("ICA") further found, after careful review of the record and the briefs submitted by the parties, that special condition 1 of the amended injunction was not overly broad or vague, and did not violate the Petitioner's right of free speech. The restriction on the volume of sound from a device based upon that sound being audible 30 feet from the source does not necessarily violate free speech. Relying on the case of *State v. Ewing*, 81 Hawai'i 156, 914 P.2d 549 (App. 1996), where the ICA held that *Revised Ordinances of Honolulu (ROH)* § 41-31.1, which made it unlawful to play a device for sound reproduction from a vehicle at a volume audible from 30 feet from the source of the sound, was not overbroad so as to infringe upon free speech because it "does not regulate the content of the sound from the reproducing device." *Id.* at 164, 914 P.2d at 557. The court concluded that special condition 1 similarly did not restrict the content of the sound, but rather its volume citing *Cohen v. California*, 403 U.S. 15, 21, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971) ("government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue.") The ICA further concluded

that special condition 1 did not violate the Petitioners' right to privacy as a person cannot reasonably have a privacy interest in that which is exposed to the public. *State v. Augafa*, 92 Hawai'i 454, 465, 992 P.2d 723, 734 (App. 1999); *State v. Texeira*, 62 Hawai'i 44, 49, 609 P.2d 131, 135 (1980). Since special condition 1 only restricted sound that could be heard outside of the Petitioners' home, it did not interfere with their right to privacy. (Pet. App. F)

As to Mirella Davies being denied her due process rights, the ICA held that Ms. Davies was not denied due process of law because special condition 1 was of the kind prayed for in the demand for judgment. The Moysas prayed for injunctive relief against harassment and stated that the harassment included, inter alia, loud noise and music from the Davies' home. Since special condition 1 enjoined the Davies from engaging in the harassing behavior of creating noise audible in the Moysas home, it fell within the prayer for relief. The court further stated that even if special condition 1 did not fall within the relief prayed for, Mirella Davies was not prejudiced by the default since she was represented by counsel at all proceedings after January 4, 2007, who contested the validity of the special conditions. Thus, Mirella Davies had the opportunity to litigate her interest in this matter in spite of her default on January 4, 2007. Since special condition 1 did not violate the Davies' right to privacy, free speech, or due process, the court held that the imposition of special condition 1 was not an abuse of discretion.

D. The appeal to the appellate courts of the State of Hawaii did not include the two criminal arrests of Petitioner Mirella M. Davies for violating the amended injunction order. (Pet. App. F) The criminal cases are still pending in the Circuit Court of the First Circuit, State of Hawaii, CR. No. 07-1-1665 and CR. No. 07-1-1762. Accordingly, all reference to the criminal cases in the Petition, and Appendices G, H and I attached to the Petition, should be disregarded.

ARGUMENT

The decisions of the Hawaii appellate courts do not conflict with a decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioners have not carried their burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The Petition Should Be Dismissed for Lack of Jurisdiction by this Court.

A. This Court Lacks Jurisdiction Because the Issues Raised in the Petition are Moot.

Article III to the U.S. Constitution limits the jurisdiction of the federal courts to "actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). Jurisdiction is a threshold issue that "cannot be waived by the parties nor ignored by the courts." *California v. LaRue*, 409 U.S. 109, 113 n.3, 93 S. Ct.

390, 34 L. Ed. 2d 342 (1972). If there is no justiciable case or controversy, the court lacks subject matter jurisdiction and has no authority to act. *See, e.g., United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980).

The "case or controversy" doctrine underpins the doctrines of standing and mootness. *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 180, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). While the standing doctrine evaluates a litigant's personal stake at the onset of a case, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 at n.4, 112 S. Ct. 2130, 2141 at n.4. 119 L. Ed. 2d 351 (1992); *Robidoux v. Celani*, 987 F.2d 931, 938 (2d Cir. 1993), "the mootness doctrine ensures that the litigant's interest in the outcome continues throughout the life of the lawsuit." *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993) (citing *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396-97, 63 L. Ed. 2d 479, 100 S. Ct. 1202 (1980); *Etuk v. Slattery*, 936 F.2d 1433, 1441 (2d Cir. 1991)).

In general, "a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 59 L. Ed. 2d 642, 99 S. Ct. 1379 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 23 L. Ed. 2d 491, 89 S. Ct. 1944 (1969) (internal quotation marks omitted)). It is akin to saying that, although an actual case or controversy once existed, changed circumstances have intervened to destroy standing to the extent that the dispute is essentially ended and meaningful relief is no longer possible. 13A

Wright & Miller, *Federal Practice and Procedure* § 3533, p. 211; § 3533.3, p. 261 (2d ed. 1984). *See also Boals v. Gray*, 775 F.2d 686, 687, 696-97 (6th Cir. 1985).

When a dispute becomes moot, there no longer remains to be resolved a real, substantial controversy between parties having adverse legal interests. In such a situation, courts lack jurisdiction to resolve the merits of issues raised by the litigation; the dispute and issues have become hypothetical or abstract, and courts are not empowered to render empty advisory opinions that can have no effect upon the behavior of the parties toward each other. *Hall v. Beals*, 396 U.S. 45, 48 (1969); *International Union, UAW v. Dana Corp.*, 697 F.2d 718, 720-21 (6th Cir. 1983).

This Petition is based on Petitioners' objections to the terms of the amended injunction. Petition at p. i. The amended injunction order expired by its own terms on January 4, 2010. As of that day, Petitioners were no longer subject to the terms and conditions of the amended injunction. The dispute between Petitioners and Respondents is no longer a real, substantial controversy between parties having adverse legal interests. *International Union, UAW* , 697 F.2d at 720-21. Under the circumstances, this Court lacks jurisdiction to resolve the issues raised by the Petition. *Id.*

Under similar circumstances, courts have applied the mootness doctrine. For instance, in *Carrabus v. Schneider*, 111 F. Supp. 2d 204, 209-10 (E.D.N.Y. 2000), the Defendant County of Suffolk

and its personnel officer moved to vacate a temporary restraining order enjoining the County of Suffolk from hiring police officers. On May 17, 2000, the plaintiffs filed an order to show cause, seeking a preliminary injunction against the County barring it from hiring police officers. The order to show cause also contained a temporary restraining order pending the hearing on the preliminary injunction. The court granted the temporary restraining order on plaintiffs' application in so far as it sought to enjoin the hiring of officers, and set a hearing on the application for a preliminary injunction for May 22, 2000. *Id.* at 206. The District Court found that under New York law a temporary restraining order was good for 10 days unless extended by the court. *Id.* at 211. Based on this finding, the District Court found that Defendants' motion to vacate the state court temporary restraining order was moot, as it had previously expired under New York law. *Id.*

Similarly, in *Tex. Instruments Inc. v. U.S. Int'l Trade Comm'n*, 851 F.2d 342 (Fed. Cir. 1988), appellee International Trade Commission moved for dismissal on the grounds of mootness as part of appellant corporation's appeal that claimed error in the holding that appellant's patent was unenforceable. In 1986 Texas Instruments filed a complaint with the Commission charging nineteen different parties with violating United States tariff laws by importing computer chips. *Id.* at 343. Texas Instruments alleged that the chips were manufactured outside the United States and that they infringed on its patents, including the '543 patent. *Id.* An administrative law judge issued an initial determination, which the Commission

declined to review, allowing the determination to become final on September 21, 1987. *Id.* In its motion to dismiss for mootness, the Commission argued that even if Texas Instruments prevailed on appeal, the law provided for no remedy because (1) the '543 patent expired on November 17, 1987, and (2) Texas Instruments waived its right to appeal the invalidity and noninfringement issues because it appealed only the unenforceability issue. The District Court vacated that the portion of the Commission's final determination relating to the patent and remanded the case to the Commission with instructions to dismiss as moot the portion of the complaint relating to that patent. *Id.* at 344. In so holding, the District Court reasoned that the remedies sought by Texas Instruments were not applicable once the patent expired, and therefore, that portion of the appeal was moot. *Id.*

B. The Evading Review Exception to the Mootness Doctrine Does Not Apply in this Case.

Petitioners acknowledge the expiration of the Amended Injunction may result in their Petition being dismissed as moot. Petition at pp. 32-33. While Petitioners do not expressly argue that the evading review exception to the mootness doctrine applies, they imply the evading review exception should prevent dismissal of the Petition for mootness. Petition at p. 32. For the reasons discussed below, Respondents believe the evading review exception to the mootness doctrine does not apply.

In *Nat'l Parks Conservation Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 574 F. Supp. 2d 1314 (S.D. Fl. 2008), plaintiffs filed a suit, challenging the issuance of a permit extension by defendant United States Army Corps of Engineers, a modification, and a biological opinion, and alleging that the Corps of Engineers violated the Clean Water Act, the National Environmental Policy Act, the Endangered Species Act, and the Administrative Procedure Act. Plaintiffs argued that their claims fell under the long-recognized exception to the mootness doctrine for issues capable of repetition yet evading review, which allows a federal court to retain jurisdiction even though the issues may be technically moot. *Id.* at 1328. The District Court dismissed the case on mootness grounds, finding that plaintiffs' claims had been rendered moot by the June 11, 2007, expiration of the permit challenged in the action, and therefore, the case no longer presented a live case or controversy for which effective relief can be granted. *Id.* at 1316. The District Court found that in order for the "[evading review] exception to the mootness doctrine to apply, however, there must be a reasonable expectation that the same complaining party will be subject to the same injury again, and the injury suffered must be of a type so inherently limited in duration that it is always likely to become moot before a federal court can fully review it. *Id.* at 1328 (quoting *Spencer v. Kemna*, 523 U.S. 1, 17, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998)(internal quotation marks omitted)). The District Court found that the "evading review" prong of the test was not met because the five (5) year term and the one (1) year extension of the permit at issue provided more than

adequate time for complete judicial review, and therefore, plaintiffs had not demonstrated that the time between the issuance or extension of the permit and its expiration was always so short as to evade review. *Id.* at 1329. Likewise, the District Court found the "repetition" prong of the exception was not met because plaintiffs did not demonstrate a reasonable likelihood that the Corps of Engineers would authorize similar dredging and filling again. *Id.* at 1329-30.

In the case of *Pharmachemie B.V. v. Barr Laboratories, Inc.*,276 F.3d 627; 349 U.S. App. D.C. 284 (D.C. Cir. 2002), Defendant appealed an order of the United States District Court for the District of Columbia, granting summary judgment in favor of plaintiff, in plaintiff's action under the Federal Food, Drug, and Cosmetic Act. Defendant argued on appeal that the district court erred in vacating an administrative ruling of the Food and Drug Administration that defendant, as the first company to file a certification for a breast cancer drug, had a statutory right to 180 days of generic exclusivity. Plaintiff argued the case was moot, because it could no longer obtain the relief it sought in its complaint due to an adverse final judgment on the validity of a patent prevented plaintiff from marketing its generic drug before the patent expired. Defendant argued the appeal was not moot under the evading review exception to the mootness doctrine. *Id.* at 632. As the Court of Appeals noted:

> ...In the absence of a class action, the capable of repetition, yet evading review doctrine [is] limited to the situation where

> two elements combine[]: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. Under the evading review prong, the question is whether the challenged activity is by its very nature short in duration, so that it could not, or probably would not, be able to be adjudicated while fully live. Under the capable of repetition prong, there must be a reasonable expectation that the same complaining party would be subjected to the same action again. This prong requires that the same parties will engage in litigation over the same issues in the future. As the Second, Seventh, and Ninth Circuits have explicitly held, relying on constitutional grounds, there must be a reasonable degree of likelihood that the issue will be the basis of a continuing controversy between these two parties in order to ensure the existence of an ongoing controversy.

Id. at 632-33 (citations and internal quotation marks omitted). Under the evading review prong, defendant argued that judicial review was limited by the duration of the 180-day exclusivity period. *Id.* at 633. The Court of Appeals found the outcome of plaintiff's patent suit, not the 180-day limit on exclusivity, resulted in the case being moot. *Id.* Under the capable of repetition prong, the Court of Appeals

pointed out that several contingencies would have to occur for the same issues to arise again:

> (1) [defendant] must be the first to have filed an [abbreviated new drug application ("ANDA")] for a particular drug [for] certification; (2) plaintiff must later file an ANDA [for] certification for the same drug; and (3) there must be some basis for a dispute as to the exclusivity period because, for example, [defendant] wins a judgment invalidating the patent and the judgment is vacated, or [plaintiff] is able to market its generic version while an appeal of [defendant's] judgment invalidating the patent is pending, or [defendant] voluntarily converts its....certification.... While the combination of all of these contingencies is possible, [defendant] has not demonstrated a reasonable likelihood that they will occur.

Based on the foregoing, the Court of Appeals dismissed the appeal as moot, vacated the judgment of the district court, and remanded the case to the district court with instructions to dismiss the complaint. *Id.* at 634. The Court of Appeals found that plaintiff would be prevented from marketing its generic drug before the patent expired, whether it won or lost on appeal, thus, making the case moot on appeal and that defendant had failed to satisfy both prongs of the evading review exception. *Id.* at 631, 633.

Finally, in the case of *Haw. County Green Party v. Clinton*, 14 F. Supp. 2d 1198 (D. Haw. 1998), the District Court granted the defendants' motion to dismiss, and held that plaintiff's requests for injunctive and declaratory relief had been rendered moot by the cessation of the disputed sonar research and the expiration of the permit at issue. On June 8, 1998, plaintiff filed a motion requesting declaratory relief and issuance of a preliminary injunction, requesting the District Court: (1) order the National Marine Fisheries Service ("NMFS") to revoke the February 18, 1998 Amended Permit granted to Dr. Christopher Clark; and (2) enjoin the NMFS from issuing any future permits that would allow low-frequency active sonar tests and research ("LFA sonar research") in Hawaiian waters. *Id.* at 1199. The District Court held that plaintiff's request for injunctive relief was moot because Dr. Clark and the Navy had completed the sonar tests and research and had no plans to resume the tests; and Dr. Clark returned the permit to NMFS and requested its cancellation. *Id.* at 1201. The District Court rejected plaintiff's argument that the evading review exception to the mootness doctrine applied. *Id.* at 1202-03. In so holding, the District Court stated:

> In order for this exception to the mootness doctrine to apply, there must be a reasonable expectation that the same complaining party will be subject to the same injury again and the injury suffered must be of a type so inherently limited in duration that it is always likely to become moot before a federal court can fully review it. First, there is simply no reasonable

> expectation that the LFA sonar research will resume as the subject permit has expired. Second, the injury claimed here is not so limited in duration. Rather, [plaintiff] received a ruling on the merits regarding its motion for TRO. Finally, and most compelling, prior to the initiation of any future tests upon endangered species and the marine environment, Dr. Clark and the [defendants] would have to apply to the NMFS for a new research permit. Under these regulations, Dr. Clark is required to submit a draft Environmental Assessment to explain the proposed research and environmental effects. Thereafter, the NMFS must publish: (1) notice of the request; and (2) the submitted draft Environmental Assessment. A 30-day public review and comment period follows. The requisite 30-day period provides ample time and opportunity for Green Party to seek judicial review.

Id. at 1202-03 (citations and internal quotation marks omitted).

Similar to *Nat'l Parks Conservation Ass'n, Inc.*, *Pharmachemie B.V.* and *Haw. County Green Party*, the present case involves an amended injunction order, which expired by its own terms on January 4, 2010. As in *Nat'l Parks Conservation Ass'n, Inc.*, *Pharmachemie B.V.* and *Haw. County Green Party*, upon expiration of the amended injunction order, the Petition became moot and the Petition should be dismissed. Nor have Petitioners

demonstrated that the evading review exception to the mootness doctrine applies. In order for another injunction to issue against Petitioners, Respondents would have to file a new petition for temporary restraining order; personally serve the petition on Petitioners; and demonstrate at a proof hearing before the District Court of the State of Hawaii, that Respondents were entitled to another injunction. At the hearing, Petitioners would be able to produce evidence in opposition to the Petition. The "evading review" prong of the exception cannot be met by Petitioners because prior to the issuance of another injunction, the District Court of the State of Hawaii will have to review the petition for temporary restraining order and all evidence and testimony submitted in support and in opposition to the Petition. This is not a process that is so short or quick as to evade review. Likewise, Petitioners cannot meet the "repetition" prong of the exception because Petitioners have not demonstrated a reasonable likelihood that another injunction will be issued against them and in favor of Respondents. The likelihood of another injunction issuing against Petitioners is subject to the District Court process described above and its outcome is dependent on the facts and circumstances involved. There is no reasonable likelihood that the same conditions that Petitioners find objectionable will be contained in another injunction. Most importantly, Petitioners control whether another injunction is issued because it is their conduct that subjected them to the issuance of an injunction in the first instance.

II The Decision of the Intermediate Court of Appeals is Consistent with Decisions of This Court.

In *U.S. v. O'Brien*, 391 US. 367, 376, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968), this Court stated: "When speech and non-speech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." In *Clark v. Community for Creative Non-Violence*, 468 US. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984), this Court stated: "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided they are justified without reference to the content of the regulated speech, that they are narrowly targeted to serve a significant government interest, and that they leave open ample alternative channels for communication of the information." This Court has also noted that local governments have "a substantial interest in protecting its citizens from unwelcome noise." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 US. 789, 806, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984). *See also Carey v. Brown*, 447 US. 455, 471, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980) (The government's interest in "protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.")

This Court has also described the right of residential privacy, i.e. the right of a citizen in his home to be free from the intrusion of unwanted speech, and the important governmental interest in protecting against such intrusion. *See Frisby v. Schultz*, 487 US. 474, 484-5, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988):

> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different ... A special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. (Citations omitted)

See also Kovacs v. Cooper, 336 US. 77,86-87,93 L. Ed. 513, 69 S. Ct. 448 (1949)("the unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to this interference with his privacy by loud speakers except through the protection of the municipality.")

In this case, the Intermediate Court of Appeals properly decided that the amended injunction order did not restrict any specific content of the Davies' music or noise. Given the content-

neutral nature of the amended injunction order, and its clear application to the interests of the Moysas, i.e. protecting the tranquility of their home against unwarranted intrusions by the Davies' loud music and sermons, and given the substantially unimpeded right of the Davies to play their music or sermons at a reasonable volume, thereby providing them an avenue of communication, the amended injunction order is presumptively valid. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47, 89 L. Ed. 2d 29, 106 S. Ct. 925 (1986).

III. The Supreme Court of the State of Hawaii Correctly Concluded Petitioners' Appeal of the Amended Injunction Order Was Untimely.

The Petitioners' September 19, 2007 notice of appeal was filed more than thirty days after entry of the July 31, 2007 amended injunction order. The timely filing of a notice of appeal in a civil case is a jurisdictional requirement that cannot be waived by the parties or disregarded by the appellate court. *See Bacon v. Karlin*, 68 Haw. 648, 650, 727 P.2d 1127, 1128 (1986). Because the Davies' did not timely appeal the July 31, 2007 amended injunction order, the Intermediate Court of Appeals lacked jurisdiction to decide the issues raised by July 31, 2007 amended injunction order, specifically whether special condition 1, as amended, violated the Davies' right of free speech.

IV. The Hawaii Supreme Court Properly Found Petitioners Were Not Entitled to Mandamus Relief.

The Supreme Court to the State of Hawaii properly denied the Davies' petition for a writ of mandamus for the following reasons: (1) Petitioners' failed to secure appellate review of the July 31, 2007 amended injunction due to their counsel's failure to file a timely appeal did not entitle Petitioners to mandamus relief since Petitioners' district court proceeding was a civil case for which the constitutional right to the effective assistance of counsel did not apply; (2) Petitioners were not entitled to mandamus relief from the June 20, 2008 order denying the motions to dismiss Cr. No. 07-1-1665 and Cr. No. 07-1-1762 since Petitioner Mirella Davies chose not to apply for a writ of certiorari to review the dismissal of her interlocutory appeal; (3) Petitioners failed to demonstrate that the district court judge issued the July 31, 2007 amended injunction with the purpose of enjoining petitioners from conduct that did not constitute harassment within the meaning of *HRS* § 604-10.5 (a)(2); and (4) Petitioners were not entitled to mandamus relief since a writ of mandamus is an extraordinary remedy that will not issue unless the Petitioners demonstrate a clear and indisputable right to relief and a lack of alternative means to redress adequately the alleged wrong or obtain the requested action. *Kema v. Gaddis*, 91 Haw. 200, 204, 982 P.2d 334, 338 (1999). Petitioners have not shown compelling reasons to revisit the Hawaii Supreme Court's decision.

CONCLUSION

Petitioners have not established compelling reasons for this Court to grant the Petition. Accordingly, Respondents respectfully request the Petition be denied.

Respectfully submitted,

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Supreme Court, U.S.
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(2)

NO. 09-799

In The
Supreme Court of the United States

ERIC L. DAVIES AND MIRELLA M. DAVIES

Petitioners,

v.

Hon. PHILIP DOI;
Judge of the Hawaii District Court, First Circuit;

Judges of the Hawaii Circuit Court, First Circuit;

DAVID T. MOYSA and JANE F. MOYSA;

Respondents.

On Petition For Writ of Certiorari
To The Supreme Court of The State of Hawaii

REPLY TO BRIEF IN OPPOSITION

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Petitioners

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SUMMARY OF ARGUMENT

1. The fact the Moysas filed a detailed brief in opposition belies their assertion that there is no longer an active controversy. The parties' legally cognizable interest in the outcome derives from both a civil judgment which hinged on matters of federal law and a pending criminal prosecution based on allegations of violation of an unconstitutional order.

2. Simultaneous with telling this court that there is no reasonable expectation that the injury will be repeated the Moysas have asked the Hawaii District court to repeat the injury, requesting another three year injunction with the same facially unconstitutional terms.

3. The decisions of the Hawaii appellate courts conflict with decisions of this court and of other state courts of last resort, and further implicate one or more federal questions that have not been decided by this court. Therefore, there are compelling reasons for the Petition to be granted:

a. The decision of the Hawaii ICA which affirmed an effective complete ban on any use of amplified sound by the Davies because it does "not regulate the content of the sound" conflicts with *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994) and a host of other decisions of this court.

b. The two decisions of the Hawaii Supreme Court holding that an inadvertent procedural error bars all future review of a facially unconstitutional order because the order was issued by a civil court conflicts with the First Amendment itself and *Marbury v. Madison* , 5 U.S.

137 (1803). Further, it raises questions that have not been clearly decided by this court.

c. The two decisions of the Hawaii Supreme court holding that there is no right to effective counsel in this civil case that involves the deprivation of fundamental constitutional rights conflicts with the decisions of many other state appellate courts of last resort, including *In re Ak.V.*, 747 A.2d 570 (D.C.2000).

REPLY TO STATEMENT OF THE CASE

The "facts" asserted by respondents that the Davies "continued to violate" the initial injunction are false[1]. [Opposition Brief pp 7-8] The appellate record contains only ex-parte claims to that effect made in writing by the Moysas. The trial court rejected these claims without holding a hearing or providing the Davies an opportunity to reply.

ARGUMENT

I. There Remains an Active Controversy and the Issues are not Moot.

The fact that the Moysas have gone to considerable effort and expense to oppose the Petition belies their claim that there is no out-

[1] The claim that the Davies harassed the Moysas is also untrue, despite the ruling of the trial court granting the injunction. The Davies believe that the Moyas claimed "harassment" because they disliked being able to overhear the Davies listening to religious teaching and found the harassment statute an effective means to silence the Davies' free speech. "Annoyance at ideas can be cloaked in annoyance at sound." *Saia v. New York*, 334 U.S. 558,562 (1948)

standing controversy because the injunction has expired. If the issues were truly resolved, the Moysas would not be working so hard to convince this court to not hear the case.

The Moysas first cite to *Allen v. Wright*, 468 U.S. 737 (1984), a case which *never* had an "actual controversy"[2], and does not directly apply. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980)[3], cited by the Moysas, supports the Davies by holding:

> "The fact that a named plaintiff's substantive claims are mooted due to an occurrence other than a judgment on the merits does not mean that all other issues in the case are mooted." (internal citations omitted) *Id* at 388.

Similarly, the fact that the injunction in question has expired without a judgment on the merits does not mean all other issues in this case are mooted. In their brief, the Moysas neglected to address the fact that there are two fundamental substantive

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[2] In *Allen*, parents of black children who were attending public schools brought a nationwide class action alleging that the IRS has not adopted sufficient procedures to deny tax-exempt status to racially discriminatory private schools. The parents did not allege that their children had ever applied or would ever apply for admission to any private school, and this court held the parents lacked standing to bring suit.

[3] Geraghty brought suit challenging the validity of the United States Parole Commission's Parole Release Guidelines. The District Court denied respondent's request for certification of the suit as a class action and this court held that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied.

unresolved issues in this case: a) financial damages and b) a still pending criminal prosecution.

As the state court was fond of noting, this is a civil case. As a result of the civil case, the Hawaii Supreme court has issued a judgment of $25,189.23 against the Davies. This judgment critically relies on the court's errant interpretation of constitutional and federal law. This petition challenges that judgment.

The petition for Mandamus presented to the Hawaii Supreme court, also raised by this Petition, included a request for an order to the Hawaii circuit court to dismiss all criminal charges against Mirella Davies which derive from the facially unconstitutional order banning barely audible sounds near the Davies' property line. The Circuit court has stayed the criminal trial pending the outcome of the appeal, and awaits this court's decision before proceeding[4].

Because of the fact that there are at least these two live, outstanding issues, the parties have "a legally cognizable interest in the outcome", this court can still provide very "meaningful relief" and the case is not moot. *County of Los Angeles v. Davis*, 440 U.S. 625 (1979)[5].

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[4] In practical effect the circuit court is providing Mirella Davies a second opportunity for interlocutory appeal since it was the court's procedural error that denied her an "official" interlocutory before the Hawaii ICA.

[5] In *Davis*, Mexican-American applicants to the Los Angeles County Fire Department brought a class action alleging discriminatory hiring practices. This court found the case moot because the department had changed its practices by order of the District Court and unlike this case there was no reasonable expectation it would resume the improper practice.

II. The "Temporary" Injunction May Soon be Repeated and the Evading Review Doctrine Applies

The Moysas argue that the evading review exception does not apply because there is no reasonable expectation that the Davies would be subject to the same injury again. [Opposition Brief, pp 16-23]. This assertion is stunningly disingenuous in light of the fact that the Moysas *have already filed a petition* before the Hawaii District court requesting an issuance of *an identical injunction* for another three years. This petition was written on January 31, 2010 – only 27 days after the expiration of the previous injunction, and *during the preparation of the opposition brief.*

Further, at the preliminary hearing before the Hawaii District court on February 11, 2010 the court stated it was inclined to rely upon the vacated but not reversed ruling of the Hawaii ICA which wrongly held that the criminalization of a barely audible sound did not violate the Davies' free speech because it did not regulate the content of the sound. As of this writing the trial date soon approaches where the district court may again deprive the Davies of their most fundamental speech rights by again forcing them to live without the use of all modern electronics which make a sound.

Should this court deny this Petition, the Davies may well be faced with at minimum another full year before a new appeal is heard again before the Hawaii ICA, which has already ruled in clear disregard for federal law and is reasonably likely to do so again.

III. The Decisions of the Hawaii ICA and the Hawaii Supreme Court are not Consistent with Decisions of this Court.

In their opposition, the Moysas do not even attempt to defend the Hawaii ICA's opinion affirming the injunction because "it does not regulate the content of the sound" [Opposition Brief pp 24-26]. Instead, the Moysas argue in a variety of ways that important government interests may justify "incidental" limitations on free speech. This is of course not inconsistent with *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994) which holds that a content neutral injunction must "burden no more speech than necessary" to achieve a "pin pointed" objective.

However, in order to not further appear disingenuous the Moysas do not even attempt to expressly argue that a ban on the slightest momentary amplified sound, at any time, in any place, audible only a few steps away from the source, regardless of whether the sound has a legitimate purpose[6] actually qualifies as an "incidental" or "reasonable" limitation, nor that it burdens "no more than necessary". Clearly the injunction condition does not even make the slightest token effort to be reasonable time, place, or manner, and in practical reality constitutes an absolute ban (as reflected by the decision of two separate federal courts in *Deegan v. City of Ithaca*, 444 F.3d 135 (2d Cir. 2005) and *Lilly v. City of Salida* 192 F Supp. 2d 1191 (D. Col 2002)). Instead,

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[6] Soon after the amended injunction issued, a large wildfire burned near the Davies' home and power was cut off. The injunction prohibited the Davies from listening to their battery powered radio for emergency information.

without any argument or grounding in fact or law, the Moysas simply wishfully fantasize that the Davies' rights are "substantially unimpeded" [Opposition Brief p 26].

There is no doubt that the sound restriction of condition 1 as amended is as facially in violation of the First Amendment as the speech content restriction was. However, that is not the question before this court. At issue is the decisions of the Hawaii Supreme court, twice holding that it is proper to bar all judicial review of a facially illegal injunction (thereby enforcing an inherently void order[7]), depriving the Davies of fundamental federal rights because the criminal injunction was issued by a civil court and, in the court's view, the Davies' attorney erred by appealing a "superfluous" order[8,9]. In their brief, the Moysas add nothing of substance on the matter, doing little more than restating the two opinions of the Hawaii supreme court denying appellate review and mandamus. [Opposition Brief pp 26-27]

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[7] "a law repugnant to the constitution is void" *Marbury v. Madison*, 5 U.S. 137 (1803)

[8] Believing that order granting the motion to amend the injunction was an appealable order, the Davies' attorney filed the notice of appeal 50 days after the injunction was issued, only 20 days past the limit allowed by Hawaii Rules of Appellate procedure Rule 4(a).

[9] An interesting contrast to this case can be found in *Crosby v. The Bradstreet Co.*, 312 F.2d 483 (2d Cir.1963) which found a stipulated injunction in volation of the First Amendent and void ab inito *thirty years* after the injunction was issued.

A ban on all judicial review of a facially illegal injunction because of an inadvertent procedural error on appeal is not proper. The reasoning is so blindingly simple that the Hawaii Supreme Court was unable to grasp it:

a) The United States Constitution is the supreme law of the land, and is therefore superior to the Hawaii Rules of Appellate Procedure[10].

b) The injunction violates the Davies' First Amendment Rights, or at the least after review would likely be found in violation.

c) The Fourteenth Amendment forbids the state of Hawaii from enforcement of laws which violate the First Amendment and further requires due process of law[11].

... and therefore...

d) The Davies are entitled to judicial review, either through direct appeal (regardless of a minor procedural error) or through a petition for mandamus.

The fact that neither the Davies, nor the Moysas, nor the Hawaii courts could find case law directly addressing these issues raised by this case is

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[10] Article 6, United States Constitution: "This Constitution.. shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"

[11] Fourteenth Amendment, United States Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law;"

a compelling reason for this court to accept this Petition.

Finally, the Moysas make no attempt to address the fact that in contrast with the Hawaii Supreme court, other state courts of last resort have found that a right to effective counsel can exist in civil cases involving the potential deprivation of fundamental rights, as justice cannot be served through a malpractice suit against the attorney. (e.g. *In re Ak.V.*, 747 A.2d 570 (D.C.2000), discussed in the Petition)

CONCLUSION

We have been made to live in fear of arrest for speaking any reference regarding the Moysas, resulting in the destruction of many personal relationships; been forced by the state to live in the manner of as if in an age before modern electronics, in practically have been banned from listening to our religious teaching inside our own home; had our home forcibly violated without a warrant by the police because someone claimed they heard a sound and now face criminal charges despite having a recording of the "witnesses" plotting to falsify claims of having heard a sound; been driven into bankruptcy and spent our life savings attempting to have our rights restored to us; and are now ordered to pay over $25,000 to the Moysas despite the court having concluded that the speech restriction violated our rights. Now, we face having to go through it all again for another three years.

Throughout all of this, no court has yet, not once, asked the most basic question: "Is this restriction reasonable?" "Does it restrict more than necessary?" In fact, six different courts (including the federal courts) have desperately avoided addressing the issue. The legal system in Hawaii has shamed itself and has lost sight of the concept of justice.

The name of each justice of this court is recognized in our home as it is in millions of others throughout the country and the world. The Supreme Court of the United States of America represents to most the ultimate, in this world, of human ability to dispense justice. While each member of the court may come from different backgrounds and exhibit different political persuasions, we and millions of others have faith in one overriding principle: You all deeply love our constitution and have dedicated your lives to protecting our freedoms.

We plead with this court to accept our Petition, so that at least one court will have drawn a line in defense of the First Amendment.

DATED: Honolulu, Hawaii, March 22, 2009.

Respectfully Submitted,

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